THE GOOD MERGER GUIDE

For charities and other civil society organisations

Produced by Prospectus and Eastside
Written by Richard Gutch
Preface

October 2012

From my first engagement in the sector there have been endless debates about the drivers for mergers; primarily negative. Many see a merger of two organisations as a survival tactic, yet it can be the greatest opportunity, notably for the clients of the combined entity.

If there is a decision to move forward and merge, then the execution is often by the “current staff” with no new resources brought in. That means that the current staff team have to go through a rapid learning process, embedding many new activities and functions. It is resource intensive. They are also subject to the well meaning advice of the professional advisers who are generally focused on what can go wrong and issues of compliance. All in all it often becomes a tough task to execute.

So when Richard Gutch approached me about supporting this publication based on his experience of mergers and the sector more widely, I was interested in a document that would look to the opportunities and be entirely accessible, thus demystifying the entire process.

Good luck.

David Gold, Prospectus

Successful mergers can have a transformative effect changing the scale, reach and prospects of an organisation and creating a better deal for the people that rely on a charity’s services.

Unhelpfully negative perceptions persist among many charities and Boards about the challenges and risks that mergers pose.

I am therefore pleased that Eastside is supporting a guide that aims to address this and emphasises the benefits of mergers especially when explored from a position of strength. This guide gives practical guidance on how to undertake a smart merger, with examples and insights from CEOs and Boards who have actually been involved in mergers.

This is a guide that shows that mergers come in all shapes and sizes, they are not the preserve of organisations with large resources, nor the refuge of the desperate. They can and should be explored regularly by the managers of small and medium-size organisations as a means to strengthen organisations and develop more sustainable services for beneficiaries.

I hope that you find this guide useful.

Richard Litchfield, Eastside

About the Author

Richard Gutch began his career as a town planner, but moved into the voluntary sector in the 1980s when he worked for NCVO and subsequently became CEO of Arthritis Care. He then worked as a funder, first as Director for England and Strategic Programmes with the National Lottery Community Fund and then as the first CEO of Futurebuilders. Since 2008, he has been an Associate with Prospectus and worked as a consultant in the sector. He was Secretary to the NCVO Funding Commission in 2010 and managed the merger of Disability Alliance, the National Centre of Independent Living and RADAR to form Disability Rights UK in January 2012. He is currently Secretary to the Legal Action Group’s Justice for All Commission. He is a former chair of ACEVO and currently a trustee of NAVCA and of Independent Age. He has written a number of publications on partnership, contracting and user involvement.

Acknowledgements

The author would particularly like to thank the following for their comments on earlier drafts of the guide and for their contributions to the case studies:

• Andrew Goodman, constitutional lawyer, Taylor Wessing
• Ben Cairns, Director, Institute for Voluntary Action Research
• Ben Kernighan, Deputy Chief Executive, NCVO
• Bill Mather, consultant and author of Merging Interests (Baring Foundation, 2000)
• Declan Bradley, employment lawyer, Taylor Wessing
• Delyth Morgan, CEO, Breast Cancer Campaign
• Gary Hoyte, HR consultant
• Joe Irvin, CEO, National Association for Voluntary and Community Action
• Kevin Williams, CEO, TACT
• Janet Morrison, CEO, Independent Age
• Lesley-Anne Alexander, CEO, Royal National Institute for Blind People
• Liz Sayce, CEO, Disability Rights UK
• Louise Howard, pension lawyer, Taylor Wessing
• Nick Partridge, CEO, Terrence Higgins Trust
• Paul Doe, CEO, Shepherd’s Bush Housing Group
• Rebecca Dray, Managing Director, Dimensions Community Enterprises
• Steve Wyler, CEO, Locality
INTRODUCTION

AIM AND APPROACH
This guide has two aims:
• To highlight the main questions to consider before embarking on a merger (Part 1)
• To provide step by step advice on the three stages of managing a merger (Part 2)
Each section in Part 2 has the following format:
• The issue to be addressed and its relevance to particular models of merger
• How to address the issue
• Brief summary of the proposed approach
Part 2 contains detailed information and advice to guide the reader through each stage of the merger process.
The guide is particularly targeted at small and medium sized organisations already considering merger as a possible option and wanting to know more about what is involved. Although the guide discusses legal issues it does not offer legal advice and readers should seek professional advice on any legal issues as necessary.

MERGER MODELS
Broadly speaking there are three possible models for merger:
A: Unified full merger – two organisations merge to form a new organisation with a new identity
B: Unified takeover – one organisation takes over another retaining its own identity
C: Group structure – two organisations become part of a formal association
In legal terms, Model A can either be achieved by transferring the assets of one organisation to the other (a form of takeover) or by creating a new organisation. Model B is achieved by transferring the assets of one organisation to the other. Model C can either be achieved by one organisation becoming a subsidiary of the other (a form of takeover) or by creating a new holding company with both organisations as subsidiaries.
Although the different models have a lot in common (e.g. in terms of initial exploration and planning and due diligence), they can involve some important technical differences. These are highlighted in the text. The choice of which model to pursue should be made after exploring the purpose of the merger; form should follow function.
It should be stressed at the outset that those involved in takeovers in the civil society sector would rarely describe them as a takeover, because of connotations of hostile acquisitions in the private sector. Sensitivities about loss of control and identity mean that the language of mergers is often quite circumspect. Terms like transfer of services, unification and association are often preferred to takeover or senior/junior partner and certainly to acquisition. Ultimately, the way in which the process is approached by both sides, rather than how it is described, is what defines the realities of the merger and how it is perceived.
Mergers involve some processes common to all charities, such as strategic planning, business planning and communication, as well as others more specific to mergers, such as due diligence, asset transfer and integration. This guide covers them all – but always in the context of mergers. Likewise, the same processes can involve very different timescales and costs, depending on the circumstances, the model adopted and the complexity of the issues involved. The guide tries to highlight these variables throughout.

EVIDENCE AND SOURCES
The guide is particularly informed by the author’s experience of a Model A merger (2009 to 2012), when he first facilitated and then managed the merger of three disability organisations – Disability Alliance, the National Centre for Independent Living and RADAR – to form Disability Rights UK. Case studies from Disability Rights UK’s experience are included throughout.
The guide also draws on interviews with CEOs involved in other examples of each model, in particular:
• The merger of bassac and the Development Trust Association to form Locality
• TACT’s takeovers of various organisations such as PROSIBS and East London Foster Carers; Independent Age’s takeover of Counsel and Care; and the Dimensions Community Enterprises takeover of the Healthy Hub and Working Gardens
• RNIB’s group structure with Action for Blind People and the Shepherds Bush Housing Association’s group structure with Staying First
The guide draws on the growing literature about mergers and includes case study material from these sources. It aims to complement this literature by focussing particularly on the practical and technical aspects of mergers.

The guide is written as if there are just two organisations involved in the merger, although often there may be three or more.

**Frequency of mergers**

For the past 10 years commentators have been saying that mergers between charities are going to start increasing, but it is difficult to get definitive statistics. In 2009, New Philanthropy Capital (NPC) reported 260 mergers on the Charity Commission’s register of mergers since the register started in 2006. NPC also reported that according to a recent Charity Commission survey only 3% of charities were considering merger. PwC reported that the number of mergers on the Charity Commission register had actually declined from 110 in 2009 to 80 in 2011. However, the register only records charities that have dissolved as part of a merger process and therefore have had to register their continuing interest in potential legacies with the Commission. Many charities do not dissolve as a result of merger, but become part of a group structure or continue as dormant subsidiaries.

Recent surveys have certainly confirmed that more and more organisations are thinking about mergers. For example, a survey of local infrastructure bodies by NAVCA in 2010 reported that 42% thought they would or might get involved in a merger in the next two years. A survey of the largest 100 charities by Eastside in 2011 reported that 91% of respondents had discussed some form of merger at Board level. The pages of Third Sector magazine are increasingly covering merger stories.

Some of the drivers for mergers are increasing, such as the difficult financial climate, the introduction of pooled community budgets and joint commissioning and the need for economies of scale in competitive tendering, as well as the move towards larger contracts to reduce transaction costs.

There is anecdotal evidence that some organisations contemplate merger, but are put off because they are unsure how to go about it. This guide is for them.
Why not consider merger? Charities and other civil society organisations should always be trying to find the best way to serve their beneficiaries and users. Increasing effectiveness and efficiency through collaboration and/or merger is one way of doing this. Deciding on your own organisation’s strategy should always precede deciding whether or not to merge, but reviewing the possibility of merger is a part of good strategic planning. A merger may help you achieve your objectives more quickly than organic growth alone. It is always best to consider merger from a position of strength, rather than being forced into it by a crisis.

If you do decide to merge with another organisation, it is likely to be for one or more of the following reasons:

- To improve service delivery
- To strengthen voice
- To increase efficiency
- To increase sustainability

A merger could improve service delivery through:

- Exploiting synergies between different, but related services
- Enabling a more holistic service to users (a ‘one-stop shop’)

A merger could strengthen voice through:

- Increasing the number of people your organisation represents
- Widening the evidence base you can draw on when influencing policy
- Enhancing profile and visibility

A merger could increase efficiency through:

- Achieving better outcomes at lower costs
- Reducing duplication between organisations working in the same field, thereby achieving economies of scale and reduction in back office functions and overheads
- Having one board and one SMT
- Improving the quality of governance through retaining, and attracting, high quality trustees
Reasons for merger - Shepherd's Bush Housing Group

Paul Doe, CEO of Shepherd’s Bush Housing Association (SBHA), was keen to develop SBHA as a service provider as well as a housing association. When the opportunity arose to work with a charity, Staying First, which provided housing advice and home improvements, he invited them to become part of the Shepherd’s Bush Housing Group as a wholly owned subsidiary. This provided SBHA with a secure, high quality supply chain, as well as providing a mechanism for applying for charitable funds for new projects. SBHA pay Staying First’s backroom service and office costs and in return Staying First provides a range of services at an agreed price, including adaptations, painting and decorating and debt advice. Staying First has grown from having a turnover of £300k to £2.5m since becoming part of the group.

SBHG has now commissioned Eastside to search for other organisations in West London that might benefit from similar arrangements to support its residents and grow services. The search criteria are:

- Small housing associations that could add value to, but not compete with, SBHG’s portfolio
- Charities providing services in SBHG’s area of concern
- Private sector companies that bring expertise in areas such as nurseries, lettings or maintenance

Source: author interview with CEO, Shepherd’s Bush Housing Group

Reasons for merger - The Healthy Hub, Working Gardens and Dimensions

Rebecca Dray and her then partner founded two Community Interest Companies (CICs), which provided supported employment and other services for disadvantaged people in Lincoln. An important part of their approach was to have an open door policy for clients, providing support to people who considered themselves disadvantaged, rather than just to those who fitted funders’ criteria. Linked to this was a strong social enterprise philosophy, generating income from services rather than depending on grants and donations. Having started the Healthy Hub in 2008 and grown it rapidly from a turnover of £60k after six months to £1.4m after two years (including the establishment of a separate sister company, Working Gardens), Rebecca was finding it difficult to sustain the two organisations in the wake of personal family difficulties and the termination of the Future Jobs Fund.

Having discussed these challenges with Richard Litchfield, CEO Eastside, they identified merging with a larger but like-minded organisation, as a way of enabling her to continue to develop the two CICs, but from a stronger organisational base. She then commissioned Eastside to help research suitable organisations for her to merge with. She wanted to find an organisation with a similar ethos and set of values, that also had the financial robustness she was seeking. The key criteria which eventually led to the decision to merge with Dimensions Community Enterprises CIC (a subsidiary of Dimensions, a social care charity and registered social landlord) were the organisation’s commitment to growing the Healthy Hub and Working Gardens CICs, retaining the open door policy for clients, and their agreement that Rebecca should join the board.

Following a restructuring, Rebecca is now Managing Director of Dimensions Community Enterprises (DCE), which not only comprises the Healthy Hub and Working Gardens, but also Dimensions’ three other social enterprises. DCE is a very important complementary offer for Dimensions now and into the future.

Source: author interview with Managing Director, Dimensions Community Enterprises

Reasons for NOT merging - Breast Cancer Charities

In their report on mergers, New Philanthropy Capital identified parts of the sector in which they thought there should be more mergers, one of which was breast cancer charities. However, one of the main reasons that charities like Breast Cancer Campaign and Breakthrough Breast Cancer have not merged is that they each depend on cause-related marketing for significant parts of their income. The major companies that support them like Asda, Marks & Spencer and Debenhams would not all want to be supporting the same charity – so in this instance funders want there to be separate charities that they can be associated with, rather than being in competition with other companies for brand profile within the same charity.

Charities supported by the same grant sources may come to a similar conclusion, although often a conversation with the funder(s) will provide reassurance and even encouragement.

Source: New Philanthropy Capital (2009) and author interview with CEO, Breast Cancer Campaign

Reasons for NOT merging - Shepherd’s Bush Housing Group

Reasons for NOT merging - The Healthy Hub, Working Gardens and Dimensions

Reasons for NOT merging - Breast Cancer Charities

A merger could increase sustainability through:

- Being more attractive to funders
- Opening up new sources of funding (e.g. through a housing association having a charitable subsidiary)
- Providing a small organisation with the finance and security to grow
- Securing larger contracts

These are the ‘rational’ reasons for merger, but in practice, there are also likely to be one or more of the following triggers:

- Impending retirement of one or more CEOs
- Financial vulnerability or even a financial crisis
- Pressure from funders or donors because of perceived duplication

At the same time, it should be remembered that mergers are time-consuming and potentially expensive (see p. 21). They should not be entered into lightly.
Merger model | Legal process | Case study | Advantages | Disadvantages |
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**A: Unified – full merger**
Two organisations merge to form a new organisation
A1: Takeover
Organisation A transfers its assets and activities (TUPE) to Organisation B. Organisation B then takes on a new name and identity
A1: Locality
- Legally more straightforward than A2 or C2
- Only one TUPE
- Potential for achieving more savings than C1
- Can be perceived as a takeover

**B: Takeover**
Organisation A transfers its assets and activities (TUPE) to, and becomes part of, Organisation B
B: TACT, Independent Age, Dimensions Community Enterprises
- Can be implemented quickly
- Only one TUPE

**C: Group structure**
Two organisations become part of a formal Association
C1: Takeover
Organisation A continues to exist but becomes a wholly owned subsidiary of Organisation B
C1: RNIB(1), Shepherd’s Bush Housing Group
- Legally more straightforward than A2 or C2
- May be no need for TUPE
- Avoids loss of identity and brand
- Can be a staging post for full merger
- May not achieve same savings as C2
- Can be perceived as loss of autonomy

**C2: New entity**
Organisations A and B both continue to exist, but both become wholly owned subsidiaries of a new holding company, Organisation C
C2: RNIB (2)
- Potential for achieving more savings than C1 e.g. through more shared staffing
- Avoids loss of identity
- Legally more complicated than A1 or C1
- Can be perceived as loss of autonomy

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**QUESTION TWO: WHAT IS A MERGER?**

Mergers are just one option in a spectrum of different ways civil society organisations can collaborate. Mergers involve structural change and, as a result, can achieve greater efficiencies than other collaborative working arrangements, like consortia and alliances, which can often be very time-consuming and resource-intensive.

In terms of legal process, mergers can either involve the creation of one unified structure (Models A and B) or a group structure (Model C). In each case, they can either involve the transfer of the control of the organisation’s assets to the other organisation (i.e. takeover) or to a new entity controlled by both the merging organisations. The following table sets out the legal processes that can be used for each of the three models of merger discussed in the guide, together with the case studies used and the main advantages and disadvantages of each approach.

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**Model A1: Locality**

The Development Trust Association (DTA) and bassac were already partners, with Community Matters, in the Community Alliance. Having been working together for some years, the creation of a new organisation was seen as having the ability to draw on the strengths of DTA and bassac to build a movement of aspiring organisations with a commitment to social justice, enterprise, asset development and self-determinism. Whilst fully supportive of the concept, Community Matters felt that its work embraced other issues.

The merger was formed by transferring bassac’s staff and business to DTA, which was renamed Locality. It involved a reduction in staff from 85 to 55, but at the same time the new organisation has been very successful in winning some significant government contracts, such as the Community Organisers contract with the Cabinet Office.

Source: IVAR Story of a Merger (2011) and author interview with CEO, Locality
Model A2: Disability Rights UK

The two main reasons given by Disability Alliance, the National Centre for Independent Living and RADAR for their decision to merge were:

- **Voice.** It has never been more important to create an influential, disability-led organisation to work with rights and equalities. In a new political and economic environment, we are determined to ensure that disabled people have a strong voice.

- **Sustainability.** We believe that we will be better placed to achieve efficiencies and economies of scale through more integrated staffing arrangements, as well as being able to secure new resources and generate increased income through being a unified organisation.

Following initial exploration, the trigger to progressing into serious discussion was the CEO of Disability Alliance resigning to take up another post. Disability Rights UK was subsequently formed as a new company through the merger of the three charities, all of which have continued as dormant subsidiaries. Prior to the merger, Disability Alliance took on some of the services of Skill, which went into liquidation in March 2011. Disability Rights UK also has a trading subsidiary, Disability Rights Enterprises Ltd.

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Model B: TACT

TACT has taken over a number of smaller organisations, each of which offered something complementary to TACT’s existing services. Although TACT has absorbed these organisations into its own structures, it has always sought to integrate the transferring organisations’ work and experience into TACT and would therefore never use the language of ‘takeover’, which their CEO feels has connotations of acquisitions in the private sector that are then bolted on or asset-stripped as part of a growth strategy.

*Source: author interview with CEO, TACT*

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Models C1 and C2: RNIB

The real challenge, as RNIB’s CEO describes it, is the fact that RNIB is one of 733 UK charities with “sight loss” in their objects. The industry is further complicated by five optometry bodies, more than 200 eye hospitals, and more than 300 social services departments. This can all lead to confused customers and unclear messages about where support can be found, as well as unnecessary competition and wasted resources. The CEO describes a world in which “everyone was going it alone and in fact we were part of the problem and not part of the solution”. This began to change in 2008 with RNIB leading the creation of the UK Vision Strategy, which brought together most of the sight loss sector behind three priorities, set by blind and partially sighted people themselves.

While this has been a significant step forward it was clear to the CEO that formal collaboration and mergers between the 733 sight loss charities was also essential. RNIB has therefore been involved in a number of different types of merger, ranging from unified takeovers to the development of a group structure which brings together four separately branded charities, including Action for Blind People. This is much stronger than a partnership, as it requires all the organisations to follow the same strategic plan, to have a shared legal structure and to rationalise customer-facing services. All the organisations in the group sign up to a formal agreement that will include some or all of the following activities: branding, funding, support services, property, assets and fundraising. Each organisation retains its own identity and board, but the members of the group report to the RNIB Board, which is also currently the holding company (RNIB under C1).

The next step under discussion is to create a new holding company, the RNIB Group (an example of model C2), which would be the sole corporate member of all the companies in the group, and could provide more integrated support services to all members. All members of the group would be represented on the holding company’s board and it is likely to have a chair elected by the members of the Group Board. The RNIB CEO estimates this could mean the group moving from a 70% improvement in efficiency to a 95% improvement.

*Source: RNIB Case Study on ACEVO website and author interview with CEO, RNIB*
HOW DOES A GROUP STRUCTURE WORK?

Group structures differ in a number of important ways from Models A and B. The main features of a typical group structure (Model C1), where Organisation X is ‘taking over’ Organisation Y, are:

Governance

- The Association Agreement allows Organisation Y to operate as an independent charity with its own trustees, but it has to accept that:
  - Organisation X becomes a corporate member of Organisation Y
  - If Organisation X intended to exercise its rights as a member, it would have to first inform and consult Organisation Y
  - Organisation X nominates two trustees to the Organisation Y Board
  - Organisation Y nominates two trustees to the Organisation X Board (one of whom would often be the chair)
  - Organisation X has to approve the appointment of all Organisation Y trustees (and its CEO), but could not withhold its approval unreasonably
  - Organisation X must not fetter the ability of Organisation Y to run the charity effectively
- Organisation Y and Organisation X agree that another charity (or other charities) might also join the group at some stage, subject to both parties agreeing
- There could be Separation Rights and Dispute Resolution procedures written in to the legal documents.

Branding

- Organisation Y maintains its own brand, but has to:
  - Undertake not to damage Organisation X’s brand (and vice versa)
  - Agree with Organisation X where joint branding might be appropriate (e.g. ‘Organisation Y working in association with Organisation X’ or vice versa)

Management and staffing

- Some Organisation Y staff are transferred to Organisation X (e.g. fundraising and some national staff), some Organisation X staff (e.g. regional staff) are transferred to Organisation Y (as set out in the Transfer Agreement)
- Organisation Y’s CEO manages all Organisation Y staff, who continue to be employed by Organisation Y, unless both parties agreed to a TUPE transfer (e.g. if it was agreed that a particular function or service should be carried out by one of the parties on behalf of the other)
- Organisation Y’s CEO continues to be employed by Organisation Y and be accountable to the Organisation Y Board, but also has a reporting line to Organisation X’s CEO

Planning and budgeting

- Organisation Y prepares its own strategic plan, business plan and budget, but it has to accept that:
  - Its plans have to be drawn up within the context of Organisation X’s plans and be complementary to them
  - It has to consult Organisation X during the preparation of its plans and share information as appropriate
  - It has to get its plans and budgets approved by Organisation X before it formally adopts them
- Organisation Y prepares its own Annual Report and Accounts, but:
  - It has to use Organisation X’s auditors, so the accounts can be prepared within the same accounting policies as Organisation X, thus facilitating the preparation of group accounts
- Both organisations have access to each others’ management accounts
**Part One: Questions**

**Question Three: What are the main stages involved in a merger and how long do they take?**

There are broadly three main stages to any merger process:

1. **Exploration**, leading to an in-principle decision to merge (or not to merge) and agreement of Heads of Terms. This can take two weeks, if there is a crisis (as when Independent Age took over Counsel and Care) or several years (as with RNIB and Action for Blind People). Some of the key variables are the urgency of the situation, the history of partnership, how much priority the trustees and CEOs give to the process and who needs to be involved in deciding whether to proceed to Stage 2. Usually, the process will take six to 12 months.

2. **Planning and due diligence**, leading to a definite decision to merge. This can take three months or as long as a year, depending on the model of merger and the complexity of the issues involved.

3. **Implementation**, leading to the operation of the new organisation. This can take up to a year or more, depending on the model of merger.

In terms of timing, there are no right or wrong answers here. Charity mergers tend to take a lot longer than mergers in the private sector. There are many reasons that can affect timing such as complexity, governance requirements, Board cycles, capacity of the organisations involved etc. While there are no rights or wrongs the longer the process takes the more uncertainty can be created. The following case studies illustrate the very different timescales that can be involved at each stage:

- **Exploration** of the Locality merger took over 10 years in total, whereas exploration of the Healthy Hub and Working Gardens merger only took two months.
- **Planning and due diligence** took between four months (Healthy Hub) and seven months (Locality).
- **Implementation** has taken around 15 months in both cases.

*Source: author interview with CEO, Locality*
Charity mergers do not involve acquisition costs in the way private sector mergers do, but they can still be expensive, because of the professional costs involved. If a new organisation is being formed and there is very little internal capacity to undertake the work involved, little or no systems to build on and alterations to premises are required (as in Disability Rights UK’s case), total costs could be between £100k and £400k. Locality estimate their costs were £150k, which included legal, redundancy and branding costs as well as some allowance for staff time, but the full cost of the actual staff time spent was higher. In a more straightforward takeover situation, where for example, there are no redundancy costs, the time and costs involved could be far lower.

Some organisations may be able to meet costs through drawing on their own resources, but this is unlikely to be an option for most organisations with low reserves. Because part of the rationale for a merger may be to save money, it is tempting to think the costs could be met by a loan repayable from savings resulting from the merger, but this would require preparation of a detailed business plan to convince a lender. This could not be done until later in the process after a lot more work has taken place. This leaves grants from trusts and foundations or government as the only real option for most organisations.

The best place to start when trying to raise funds is your existing funders. They have a vested interest in helping sustain the organisation(s) – and, in any event, need to be kept informed about merger plans. When Independent Age was negotiating its takeover of Counsel and Care, they approached all the major trusts that had supported Counsel and Care for ‘dowry’ funding to help save their services and support the transition. This was also in recognition of the fact that some of this funding would not be continued in the future – because some funders only funded smaller organisations and because some of the funders overlapped between the two organisations and could not therefore be expected to carry on funding one organisation to the same extent. They used the urgency of the situation as a selling point, emphasising the benefits of the merger for providing a wider all-round service that would build on the strengths of both charities (one plus one equals three). The approach yielded over £300k in the space of two months.

**Stage 1: Exploration**

The main costs involved in this stage are likely to be the costs of an independent consultant, some initial legal advice and an Away Day, which could be between £10k and £30k. In a crisis situation, when one organisation is approached to take over another, this stage could just take two weeks and cost much less (as was the case with the Independent Age and Counsel and Care takeover, which only involved the cost of initial legal advice).
What is needed from funders at this stage, in addition to an initial feasibility grant of around £10k, is at least a willingness to consider funding some of the (much more substantial) costs involved in later stages. Funders need to be open to the possibility that Stage 1 may lead to a decision not to merge. Funding applications for this stage need to be able to articulate the case for merger and generate some excitement about the vision for the merged organisation.

**Stage 2: Planning and due diligence**

This stage involves much higher expenditure than Stage 1, as well as higher risks. The main costs involved are the Project Manager (or, perhaps, backfill to create internal capacity to take on this role), legal fees, HR advice, pension advice, auditors and consultation/meeting costs. In overall terms, this stage could cost at least £100k.

Funders need to be confident that the costs they are being asked to fund for planning and due diligence work and professional fees are realistic and the plans being drawn up are robust. A funder may wish to commission an independent consultant to review the robustness of the proposed business plan. Where an application also includes Stage 3 costs, they may decide to manage the risks involved by giving the grant in two stages, with the second stage being conditional on the consultant’s review and on formal agreement to merger at the end of Stage 2. Funding applications for this stage need to be able to provide convincing details of the different activities and costs involved.

**Stage 3: Implementation**

The costs in this phase are likely to vary most of all depending on the model of merger and the complexities involved. They could be very low, as in some group structures, or could be in the hundreds of thousands, depending on how much change is required to existing arrangements. The main costs involved are a project manager, redundancies, office alterations/moves and set up, systems integration, rebranding, integrating communications and websites, and launch. There may also be indirect costs, such as loss of income from restructuring and reduced focus on income generation as a result of work on the merger.

Because of the high costs involved in implementing mergers (especially under model A2), there is likely to be a need for a number of funders to be involved. If this is done in a coordinated way, with key reports and assessments shared, a great deal of time and effort can be saved. Funders need to be satisfied as to how essential certain costs are to the merger process, as opposed to the ongoing ‘nice to haves’ of any organisation. The other complexity is the changing financial environment. This may well have been one of the drivers for merger, as it was for both Locality and Disability Rights UK, because a reduction in government funding was always being anticipated. If each organisation had tried to continue on its own, they might not have survived, but as a single new, but overall smaller organisation, they are more viable. Does their reduction in size count as saving money?

Ultimately, though, the financial success of a merger is less about specific savings and more about whether the financial health of the new organisation or group is greater than the status quo.

**Question Five: Do mergers save money?**

This tends to be one of the first questions external commentators ask – and it is a difficult question to give a straightforward answer to. As explained in Question 4, the process of merger itself involves a lot of staff time and can be expensive. However, under Models A and B, there will nearly always be three areas of saving: governance costs (one board in place of two), at CEO level (one CEO in place of two) and in back office functions, including audit costs. However, under Model C (group structures) it is quite possible not to achieve any of these savings; indeed, the extra complexity of group structures could even increase administrative costs.

Under all three models, there may also be scope for some rationalisation of services, but equally, one of the reasons for merger may have been to improve or develop some aspect of service delivery or support service, which could mean potential savings being reinvested post-merger, e.g. in fundraising or financial management, or in some aspect of service delivery.
QUESTION SIX: WHAT MAKES FOR A SUCCESSFUL MERGER?

- **Trust.** The key individuals involved, usually the two CEOs, must trust each other and be able to get on. If trust is not present on day one, it can still be developed through the process of the merger, provided both parties recognise its importance and work hard at it.

- **Energy.** Mergers involve a lot of work. Those leading the process must be prepared to put a lot of time in, maintain momentum and keep driving the process forward.

- **Shared vision.** There must be an agreed and compelling vision setting out what the new organisation is trying to achieve. This should act as a guiding light throughout the process, particularly when difficulties are encountered en route, so everyone involved can answer the question: ‘Why are we doing this?’

- **Organisational fit and business case.** The merging organisations must either have complementary or similar activities, which result in added value when brought together (e.g. greater breadth, reach and strength). There must also be a sound business case for merging, e.g. increased efficiency, increased income generation potential and/or increased sustainability. Mergers can also provide opportunities to do things better, to review what to cease doing and to add in new activities to produce improved results.

- **Buy-in from the top.** The Chairs and CEOs must be committed to the merger. If the idea is initiated by the Chairs, they need to bring the CEOs on board quickly and vice versa. This may require discussion early on about the process for filling these key roles in the new organisation. An independent facilitator can help open up these questions.

- **Leadership, planning and management.** It must be clear who is leading the process at any given point. This could be the two Chairs or the two CEOs acting jointly or, preferably, one could be appointed to lead at trustee level and one at staff level. There should be a joint steering group of trustees, as well as a project team of relevant staff. A clear project plan needs to be developed setting out key milestones, deadlines and decision points for each of the three stages. A project manager could also be appointed, working to the agreed leads, to develop the plan and then manage the process. Alternatively, there could be backfill to free up some CEO time for merger work. The key thing is to discuss the difficult questions of leadership roles at the start not the end of the process.

- **Openness about risks and deal breakers.** During Stage 1, there must be early and explicit discussion about potential deal breakers (such as shared vision, priority services and pension issues or financial viability). These can then be reflected in Heads of Terms agreed at the end of Stage 1. There should also be a risk register for the merger, which is regularly reviewed by the joint steering group and the project team.

- **Communication with key stakeholders.** Key stakeholders will include the rest of the trustees and staff, members, funders, contract clients, service users, partners and relevant government bodies and regulators. Judgements about when and how much to communicate about the merger will have to be made throughout the process. This should be a standing item for every meeting of the joint steering group and project team.

- **External input and advice.** Mergers usually require an external facilitator to help address the more sensitive issues (deal breakers, appointment of Chair/CEO, cultural differences). There will also be a need for specialist legal advice and often HR, pension and IT advice. In certain situations, Charity Commission or CIC Regulator advice and/or approval may be required.
QUESTION SEVEN: WHAT ARE THE BIGGEST BARRIERS TO SUCCESSFUL MERGERS?

- **Cultural differences.** If fundamental differences in values and culture are not identified and addressed early on this can become the main reason why mergers fail. In a survey in 2004, Charity Finance reported that 52% of respondents said culture clash was the biggest barrier to the merger process. Agreeing a common set of values should be part of Stage 1 discussions, since if this can’t be achieved the merger should not proceed. Even when agreement is reached, there will continue to be differences of approach throughout the whole process. Brushing these aside will only lead to problems post-merger.

- **Fear of loss of identity and independence.** This is one of the reasons why organisations often begin by being attracted by the group structure model, even though it may not deliver the same level of efficiencies and savings. The language of ‘takeover’ is very off-putting; even the term merger worries some people. For this reason, Disability Rights UK talked about ‘unification’, which was felt to be a less threatening term. In practice, once a merger has taken place these concerns and the issue of loss of identity usually recede very quickly.

- **Egos – the self-interest of trustees and/or staff.** Trustees and senior staff are not shareholders, but their personal stake in the organisation will often be very high and they will be reluctant to see it diminished. Personal and emotional attachments must be identified up front. Open discussion of concerns (and how best to mitigate them), potentially with the help of an independent facilitator, is an important part of the process. Sometimes it is the departure of a key figure, such as the CEO, which is the real trigger to serious discussions about merger.

- **Failures in planning and process.** Unless a realistic and achievable plan for the merger process is developed at an early stage and kept under constant review by a project manager, momentum can be lost and the process become derailed.

- **Opposition to the concept.** If there continue to be strong pockets of opposition to the idea of merger, these can resurface at critical times in the process. It is important to try and engage the most influential naysayers in the process from the outset.

- **Costs/lack of resources.** Mergers are time-consuming and expensive. Unless a realistic budget and staffing plan, and the resources required to implement it, are in place early on, it will be difficult to make progress.

- **Failure to integrate.** Once a merger has formally taken place, a major task is to integrate all the different systems and processes of the organisations. If this isn’t driven forward, the planned benefits of merger will not be fully realised. Time and resources must be allowed for this, as this stage can take a year or more to complete.

- **Poor appointments.** There can be a danger that internal staff get appointed to key positions for which they are not suited. This can be because of trustee loyalty, a reluctance to make difficult decisions or short term financial considerations. Involvement of an external person on the interview panel can help avoid this danger.

- **Late joiners.** When trustees join after a merger has taken place, they may not be aware of the rationale for some of the merger arrangements and may begin to challenge them. It is important, therefore, to ensure that new joiners are well inducted to try and avoid having to repeat past negotiations.
QUESTION EIGHT: WHAT ARE THE BOTTOM LINES FOR YOUR ORGANISATION?

It is always advisable to think about the bottom lines or non-negotiables in a potential merger at an early stage, whilst still approaching discussions with as open a mind as possible. It is helpful to think about the reasons why some points may be non-negotiable:

• **Protection of beneficiaries’ points** may be non-negotiable: to think about the reasons why some as open a mind as possible. It is helpful whilst still approaching discussions with a potential merger at an early stage, the bottom lines or non-negotiables in It is always advisable to think about qUESTION EIGHT: whAT ARE the bottom lInes for your orgAnIsAtIon?

• **Self-interest.** This could be your own interest or that of your chair or board. On the whole, these type of bottom lines should be resisted. They could also include form of merger, name and composition of board, as well as appointment of Chair/Vice Chair or CEO/Deputy CEO. The more that merger discussions can be approached with an open mind on these issues the better. Discussions about vision and function should take place before deciding on these matters (unless they are tactically important, as discussed above). For example, it may be tempting for the two CEOs to agree informally that one should be CEO and the other Deputy CEO, but before leaping to conclusions about staffing structure and appointments, there first needs to be a thorough discussion about what the new organisation is going to do and what structure it needs – and can afford – to do it.

• **Securing support from trustees and members.** There may be some bottom lines which are essential to getting the merger agreed. These may be short-term, tactical considerations, which are nevertheless crucial to the whole process going forward. They could include maintenance of the name, retention of particular services for members or the composition/balance of the new board. In order to get the merger through, some decisions may have to be compromised on, knowing that after a year or two, it may be possible to make further changes. The form of merger could be one of these: for example, a group structure may sometimes be a staging post for full merger at a later date.

QUESTION NINE: whAT does A ceo need to thInk about to mAnAGE A boArd through A merger?

• **Involvement of the Board Chair.** Early discussion with the Chair is essential. Unless the Chair is at least willing to discuss a potential merger, there will be very little prospect of making progress.

• **Informing other trustees.** One of the things to discuss with the Chair is when and how to inform, and start involving, other trustees. It is advisable to have at least the outline of a vision for the new organisation before doing this, as this will be important to securing their interest in taking discussions forward. The need for confidentiality at this stage should be stressed.

• **Eliciting trustees’ concerns.** It is helpful to get an early feel for the issues of concern to trustees and a sense of who the main supporters and naysayers are likely to be. Suggesting the Chair goes round the table inviting each trustee to give their initial views can be a useful tactic.

• **Addressing capacity and cost issues.** One immediate concern trustees are likely to raise is the time and cost involved. It is therefore wise to have some initial assessment of this, as well as potential funding sources for merger costs.

• **Establishing a joint steering group.** As indicated earlier, there is likely to be a need for a joint steering group involving two or three trustees from each organisation. It can be a good tactic to involve a potential naysayer at this stage in order to ensure that relevant concerns are aired and addressed – and to help persuade other trustees further on in the process.

• **Involving an independent facilitator.** If the merger is likely to raise difficult or complex issues it can be particularly helpful to involve an independent facilitator, who can ensure that certain types of issues are aired and explored more easily than would be possible for the CEO.

• **Chair and CEO issues.** One of those issues may be the process for deciding who is going to lead the process and who is going to be the eventual Chair and CEO. Agreeing a process for deciding on this early on is important. Initially, depending on the type of merger, there may be a need for sharing out these roles, but the sooner the final arrangements can be agreed the better. The implications for those staff who do not secure positions going forward (e.g. in terms of severance packages) also need to be agreed sooner rather than later, so that people are clear where they stand.

About to mAnAGE A boArd through A merger?
• **Adopting a proportionate approach.** Trustees will, rightly, be concerned about risks. However, these must be kept in proportion. As Paul Doe, CEO Shepherd's Bush Housing Group put it: ‘If I have a £40m turnover, how exercised should I be over £10k of uncertainty?’

• **Future governance arrangements.** Depending on the model of merger, a number of the trustees may be faced with the prospect of losing their board positions. For some, this may be a natural opportunity to move on, but for others there may be a sense of loss. It is tempting to start suggesting mechanisms for ensuring their continued involvement, such as advisory groups or forums, but care should be taken not to create cumbersome arrangements purely for short term, tactical reasons. At the same time, there may be good reasons for trying to ensure that some of this talent is retained for the benefit of the new organisation.

• **Celebrate past achievements.** The process of merger can be all-consuming and it is very easy to be so absorbed in the excitement of creating a new organisation that the achievements of those involved in the old organisation are forgotten. Some form of celebration of past achievements can be a good tactic.

• **Reassurance.** As far as possible, it is also important to reassure those who are on the way out about the continuation of those services they particularly valued. For example, in a takeover model the new chair could attend the final meeting of the old board to give them these assurances and to thank them for their work for the old organisation.

**QUESTION TEN: HOW CAN THE DILEMMAS INVOLVED IN PLANNING MERGERS BE ADDRESSED?**

Anyone embarking on a merger will find they are faced with a series of ‘chicken and egg’ issues:

• **How can members and trustees decide whether merger is right, without knowing what the merged organisation’s strategy, business plan, leadership and staffing structure is going to be?** Agree in principle to explore merger, but only make final decision when the likely shape of the new organisation is known following Stage 2 work.

• How can you develop a clear strategy and business plan for the new organisation, when it is not clear what the leadership of the new organisation is going to be? Have a joint steering group of trustees and decide on a chair designate and a CEO designate (preferably from different organisations) as soon as possible in Stage 2. Involve an independent facilitator, initially reporting to the joint steering group, and then to the CEO designate once appointed.

• **How can you involve senior managers early on, when you don’t know what kind of SMT you can afford or who the senior managers are going to be?** Work with a joint SMT to start with in Stage 1. Once the joint board has agreed a strategy and draft business plan, decide on your SMT structure and appoint senior managers designate in Stage 2.

• **How can you reduce staff uncertainty, when (some) staff redundancies are probably inevitable?** Be as open as possible about the process and the timetable and ensure staff are consulted at every stage. Make clear when decisions about their positions will be made in Stage 3, so that people can plan accordingly.

• **How can you commit expenditure on the merger process, when you don’t know whether it is definitely going to go ahead?** Don’t commit to any expenditure, unless you have the reserves or the grant funding to support it. Minimise commitments until members/trustees have agreed in principle to explore merger at the end of Stage 1. Phase expenditure so the biggest items (accommodation, rebranding, redundancies) don’t occur until Stage 3, after the formal decision to merge at the end of Stage 2. Be open with grant-makers about the potential risks in the period up to the formal decision.
Each sub-section in Part 2 has the following format:

- Summary of the issue to be addressed and its relevance to particular models of merger
- How to address the issue
- Brief summary

The following three models of merger are referred to throughout:

A: **Unified full merger** – two organisations merge to form a new organisation with a new identity

B: **Unified takeover** – one organisation takes over another retaining its own identity

C: **Group structure** – two organisations become part of a formal association

For further details of the three models see Part 1, pp. 12-13.

A number of the issues are illustrated with case study material, mainly from Disability Rights UK. The three stages of merger in Disability Rights UK’s case were:

- **Stage 1 – Exploration** (March 2009 – October 2010). This stage was initiated by the three charities’ chairs, who wanted to explore the potential for collaboration. With the help of two grants from the Capacitybuilders Modernisation Fund, they commissioned Richard Gutch to interview key trustees and the CEOs of the three charities and identify what they saw as the distinctive features of their charity, current challenges and opportunities, views of each other, potential benefits, disadvantages and bottom lines in any collaborative working arrangement. This stage involved a half-day workshop to discuss the interview findings, as well as exploration of different models of collaboration, and a 24 hour away day with a wider group of trustees. As a first step, a new holding company, the Disability Rights Partnership, was established to undertake joint work on behalf of the three charities. Following the resignation of the CEO of the Disability Alliance in August 2010, it was decided to recommend to the members at their autumn 2010 AGMs to explore a full merger, as a more efficient and effective model.

- **Stage 2 – Detailed planning and due diligence** (November 2010 – October 2011). This stage involved merger project planning, strategic planning and business planning, constitution and governance arrangements, communication and consultation, amendments to the articles and name of the Disability Rights Partnership, pension transfer arrangements, HR advice and due diligence. This stage ended with the boards of the three charities recommending to their Members at their October 2011 AGMs that they merge to form Disability Rights UK.

- **Stage 3 – Implementation** (November 2011 – November 2012). This stage covered the transfer of staff and assets on 1 January 2012 and restructuring, redundancy for staff not appointed to the new structure, recruitment of new staff as required, co-location, common telephony and email, common IT, finance and CRM systems, rebranding and integrated website, transfer of members from the three charities to Disability Rights UK and an EGM in March 2012 to elect some new trustees. This stage will end with the launch of the new organisation in November 2012.
Stage one: Exploration

Assuming this is the case, there then needs to be an external exploration with the potential partner.

- Deciding on working arrangements
- Clarifying who will lead
- Seeking professional advice on key issues
- Exploring the issues and developing a shared vision with key players
- Decision-making and communication

There then needs to be an in-depth internal exploration of the advantages and disadvantages of collaboration or merger with a particular organisation, before deciding whether to proceed further. Ideally, this exploration should already have been taking place in general terms as part of the organisation’s ongoing strategic planning process, but without necessarily identifying a specific partner. The organisation then has a view as to why and when merger might be a sensible option to pursue. This guide therefore assumes there is at least an, in principle, interest within the organisation in exploring the possibility of merger under agreed circumstances.

One organisation identifies the need to find a merger partner as part of its strategic planning process, e.g. a large organisation may wish to extend its reach or widen its expertise, or a small organisation may be in financial or operational difficulty and approaches a potential partner.

There could be a number of starting points:

- Two chairs or two CEOs begin discussing informally the potential for collaboration or merger as a means of increasing sustainability or strengthening voice
- A funder encourages two organisations to consider closer collaboration or merger
- One organisation is in a financial crisis and needs to merge to survive
DECIDING ON WORKING ARRANGEMENTS

How can the spirit of collaboration best be reflected in the working arrangements for exploring merger? Relevant to all three models.

The approach should include:

- A joint steering group of trustees to oversee the process. This should include the chairs and ideally some trustees who are not yet convinced of the merits of collaboration or merger with the other organisation, or who are well placed to represent the potential concerns of critical interests, such as the beneficiaries or members. In order to overcome any perceptions or concerns about takeover, it is advisable to have equal representation of the two organisations, even though one may be larger than the other. This group needs to run in parallel with the organisations’ normal governance arrangements and be timed to be able to report back to them. Inevitably, this will put increased pressure on the trustees involved.

- A joint management group or project board of the CEOs, relevant senior staff and, where applicable, advisers. This group would be responsible for developing and signing off reports to the joint steering group. Where trustees delegate heavily to the CEO and staff, this group could effectively lead the process.

- A Project Manager appointed by the joint steering group and the joint management group, who could either be an internal secondee or an independent consultant. In a straightforward takeover, this role could be performed by the CEO of the ‘taking over’ organisation, but in most other cases the CEO will not have the capacity to perform this role as well as the day-to-day management of their own organisation (unless some backfill arrangements are put in place). Similarly, in smaller organisations, there is unlikely to be an internal member of staff with the capacity, or perhaps with the skills, to take on this role, so a consultant may be needed to help.

- There may also be a need for a confidentiality agreement and/or a Heads of Terms agreement between the two organisations to formalise working arrangements at the outset. As soon as work begins, the issue of costs will arise. Unless the organisation(s) have reserves, what is likely to be needed is a grant of at least £10k to meet the costs of a facilitator, possibly an away day and some high-level professional advice. Some trusts and foundations have established funding programmes for Stage 1 costs, particularly for their existing grantees. However, in many cases it may be necessary for organisations to agree a contribution from reserves to meet these initial costs.

CLARIFYING WHO WILL LEAD

By their nature, mergers pose a crucial question about who is going to lead, which has to be continually revisited throughout the process. Under models A and C, this will be a critical issue.

During Stage 1, there needs to be agreement between the two parties as to where to vest the leadership. The role is essentially to manage and drive forward the exploration process. However, during Stage 2 and certainly by Stage 3, the role becomes more one of leading and championing change and this requires a leader who has been given the necessary authority, whether through being elected chair or being appointed CEO, perhaps on an interim or designate basis. If the two CEOs are initially going to lead the process, there needs to be explicit agreement about how the tasks are going to be shared out between them.

Under models A and C, there may be an inevitable element of ‘jockeying for position’ at this early stage in the process. One option is to have meetings alternately chaired, but this can result in ambiguity about leadership. A better option is for the joint steering group to choose one of its members to be chair and to lead the process and then to have a vice-chair from the other organisation. Similar arrangements could be agreed for the joint management group, but with the ‘other’ organisation providing the chair. Alternatively, the consultant could chair this group and lead the Stage 1 process.

Under model B, there would usually be agreement at the outset that the CEO of the larger organisation would lead the process, but, as can be seen from the Healthy Hub and Working Gardens case study in Part 1, the process can sometimes be led by the CEO or Managing Director of the smaller organisation that is seeking a suitable organisation to be taken over by.

SUMMARY

Decide on clear leadership arrangements which reflect the power relationships in the model of merger being explored. In a straightforward takeover (model B), the CEO of the larger organisation will normally (but not always) lead, but under models A and C, leadership arrangements need to be agreed explicitly early on.

Leadership arrangements: Thames Reach and Bondway

In 2000, Bondway approached Thames Reach about the possibility of a merger. One factor, in addition to major changes taking place in the homelessness field, was the imminent retirement of Bondway’s CEO. This gave additional impetus to the need for a merger and, later, prevented one of the most common barriers to merger arising; the struggle over who should head up the new organisation. Following further discussions, the CEO of Thames Reach was in the fortunate position of being given authority by both boards to lead on the merger with the expectation that he would be CEO of the new organisation.

Source: Case study on ACEVO website www.acevo.org.uk

SUMMARY

Establish a joint steering group of trustees and a joint management group and agree initial funding arrangements.
SEEKING PROFESSIONAL ADVICE ON KEY ISSUES

What types of professional advice are going to be needed and how are they best provided? Relevant to all three models.

If the organisation is a charity, it is advisable to seek the advice of the Charity Commission at an early stage, even though, depending on the circumstances, their approval may not necessarily be required. They have a number of useful guides and resources, such as Making Mergers Work, which includes a list of 20 questions trustees need to ask about mergers, as well as a due diligence checklist. Similarly, if the organisation is a Community Interest Company, it is advisable to seek the advice of the CIC Regulator at an early stage.

Four other types of advice are likely to be required both at this and later stages:

- **Legal advice.** In Stage 1, there will be a need for advice on whether the organisations have the power to collaborate and/or merge, whether their objects are compatible and whether there are any restrictions on the use of either organisation’s funds or assets (e.g. property). This advice could also cover which models of merger might best suit the two organisations should they wish to go down this path (see Part 1, Question 2). However it is essential, at this stage, to keep the involvement of lawyers to a minimum, since most of the questions being addressed in Stage 1 are strategic, not legal. In any event, in most cases there is no need for each organisation to appoint their own lawyer – one lawyer can act on behalf of both.

- **Pension advice.** One of the biggest deal-breakers can be the existence of a defined benefit pension scheme. It is advisable to get high-level advice on the implications of this, and ways of addressing it, at an early stage, since it may turn out to be the reason for ending the discussions straight away.

- **HR advice.** Another important area for some high-level advice early on is the requirement under employment law to consult staff on the Transfer of Undertakings (Protection of Employment Regulations 2006) (TUPE) and on possible restructuring proposals. It is important to ensure communications with staff on these issues don’t create any hostages to fortune later in the process. If there is no in-house expertise on these issues, some high-level professional advice should be sought. The project manager has an important role in ensuring that clear briefs and specifications for this advice are agreed to help identify potential deal breakers. Larger organisations may have access to pension and HR advice internally. Independent brokerage may also be needed to help identify suitable organisations to merge with.

- **Independent facilitation.** Because of the nature of the issues involved, it is usually desirable to have an independent facilitator, who has the trust of all parties and can act as an honest adviser and broker.

**Professional advisers: Locality**

Involvement of the Institute for Voluntary Action Research (IVAR) as researchers with wide experience of voluntary and community sector mergers and of Bates Wells and Braithwaite as legal advisers (who acted for both organisations, with a Chinese Wall between them), particularly in Stage 2, was considered beneficial by the Locality Joint Merger Steering Group. The advisers brought an element of objectivity to discussions, probing the reasons behind statements and opinions offered and knowing when to accelerate the discussions and when to allow it to run its course. The ability to set a particular merger within the wider context of mergers and to offer guidance based on that experience, provided reassurance and ideas about the ways in which challenges can be addressed.

Source: IVAR Story of a Merger (2011)
Independent brokerage: Eastside

Two of the organisations featured in this guide, Shepherd's Bush Housing Group (SBHG) and the Healthy Hub and Working Gardens CICs, have used Eastside to help them find suitable merger partners. Eastside offer this service through their Partnering Up initiative, which provides a mechanism for linking up organisations with a potential interest in partnering or merging.

In the case of SBHG, the brief was to find the following:

- Small housing associations that could add value to, but not compete with SBHG’s portfolio
- Charities providing services in SBHG’s area of concern
- Private sector companies that could bring expertise in areas such as nurseries, lettings or maintenance

Paul Doe, CEO of SBHG, sees the benefits of using consultants in this role as being:

- Involvement of an independent, knowledgeable third party
- Consultants can undertake initial research and due diligence
- Enables SBHG to remain neutral and ‘above the fray’
- Means that, when the two parties meet, each knows about the other, and the ground has been prepared for a positive discussion

In the case of the Healthy Hub and Working Gardens CICs, the brief was to find a suitable larger organisation to take them over, but on their own terms. These included retention of their Open Door policy and a place on the board. Rebecca Dray, Managing Director, felt that Eastside brought:

- Knowledge of the process, especially advising on how the CICs could be in control of the process, rather than just being on the receiving end
- Ability to explain the process in layman’s terms to someone who had no previous experience in the field of mergers
- Thinking outside the box when it came to identifying and researching potential partners
- Willingness to respond to their style and ethos of doing things— for example, maintaining a very open and engaging approach with staff
- Understanding of the journey Rebecca and her colleagues had been on and a continued willingness to help

Source: author interviews with CEO, Shepherds Bush Housing Group and Managing Director, Dimensions Community Enterprises CIC

EXPLORING THE ISSUES AND DEVELOPING A SHARED VISION WITH KEY PLAYERS

What are the issues that need to be discussed prior to agreement of heads of terms or a decision not to proceed? How should these be explored? Relevant to all three models.

Ideally, this should be done with the help of an independent facilitator, who can explore sensitive issues through interviews with a selection of trustees, the CEOs and some senior staff. The range of topics to be addressed at this stage include:

- Is there agreement about vision, values and aims?
- Are there significant cultural differences which could get in the way?
- Is there the right chemistry between the organisations?
- Are trustees really up for it, given the work involved and the likelihood of not all of them having roles in the new organisation?
- How is the issue of two Chairs and two CEOs going to be resolved?
- Are identities going to be merged or protected? (depends largely on the form of merger)
- What form of merger is likely to be most appropriate?
- What membership arrangements (if any) would there be?
- What are the biggest risks involved for the two organisations?
- Are there any potential deal-breakers, such as pensions? If so, are there potential solutions?
- What is the likely timetable and process for Stages 2 and 3, bearing in mind constitutional requirements and member consultation and agreement?
- How would the organisations develop the capacity to see though a merger when they are fighting for survival and engrossed in contracting and fundraising for the organisation?
- How would the costs of Stages 2 and 3 be met?

Following discussion at the Joint Steering Group, the next step should ideally be an away day with all the trustees and the SMTs, at which the issues arising from the interviews can be discussed, along with any high-level legal, HR and pension advice commissioned at this stage. This initial exploration is in effect a high-level due diligence exercise (see also Stage 2: Undertaking due diligence and risk assessment).

A shared vision for the new organisation also needs to be developed at this stage. Without a shared vision, there is always a danger that discussion begins to focus on structural issues (what kind of merger model should we adopt? What kind of membership arrangements are going to be needed?), rather than ensuring that form follows purpose. The shared vision needs to be compelling and powerful, since it...
is this that all parties will need to keep returning to when practical difficulties or personality or cultural differences start derailing the process at later stages. The vision needs to be able to answer the question ‘Why are we going through all this?’ in a positive and convincing way. ‘We all agreed that by merging we could develop a better world for our beneficiaries, because…..’

Possible outcomes at this stage could be recommendations to the organisations’ boards to:

• Adopt a ‘try before you buy’ approach whereby the two organisations decide to undertake some joint work, either through an informal collaborative arrangement, or through a more formal partnership arrangement such as a joint subsidiary, before deciding whether to merge

• Agree Heads of Terms (the key points arising from an exploration of the issues, which will subsequently be reflected in all relevant legal documentation) and proceed to Stage 2

• End discussions and not proceed any further

**SUMMARY**

The issues that need to be explored with key players at this stage range from vision, culture, chemistry and strategy to control, identity, potential deal-breakers and key appointments. You don’t need to have worked out all the detail but you do need confidence that you can get there. Possible outcomes could be some form of collaboration, rather than merger; agreement of heads of terms and proceeding to Stage 2; or an end to discussions.

**DECISION MAKING AND COMMUNICATION**

**What should the process be for making the decision at the end of Stage 1 and at what point should internal and external communication begin? Relevant to all three models.**

Any final decisions regarding the outcome of Stage 1 should be taken by the boards of the two organisations. It is advisable to decide in advance what the ‘rules’ for making the decision are going to be. For example, does the decision need to be unanimous (in which case each trustee effectively has a veto), a simple majority or 75%? Both organisations should remain open to the possibility of deciding not to merge. If they do wish to proceed they may wish, at this point, to agree a policy position on some of the issues to be addressed in Stage 2 (see Disability Rights UK overleaf).

If the organisation(s) have members with voting rights, then it would be good practice to get their backing at an AGM or EGM to proceed with detailed discussions about merger. Otherwise, there is a danger that when it comes to seeking their formal agreement to merger, they may feel alienated from the process and unwilling to agree.

One of the constant dilemmas in a merger process is when and how much to communicate to others outside the immediate joint working arrangements – in particular, when to tell other staff (assuming the SMT have been involved from an early stage), funders and other key stakeholders. Seeing senior staff in regular discussions with another organisation is bound to start ringing alarm bells for other staff.

As a general rule, staff and funders should be informed about the possibility of merger as soon as:

• There is an agreement by the Joint Steering Group to recommend exploration of merger

• There is clarity about the process and timetable for Stage 2, leading up to the final decision on merger, so staff’s initial questions can be answered

• Consultation with members has been agreed (but before it takes place)

A guiding principle is to ensure that staff and funders hear about the possibility of merger from the CEO and not from other parties when it has already got into the public arena. The two organisations should align their communications, whilst recognising that, depending on the model of merger under discussion, different staff will be affected in different ways. See Stage 2: communicating and consulting.

**SUMMARY**

The decision at the end of Stage 1 can be taken by the two boards, but, in the case of membership organisations, it is advisable to get member backing before proceeding to Stage 2. Staff and funders should be informed before the possibility of merger gets into the public arena.
At the NCIL (National Centre for Independent Living) AGM a detailed policy position was agreed. This provided members with reassurance on a number of important issues, which otherwise could have turned out to be showstoppers. Extracts from this policy position are given below:

This AGM believes:

• The new organisations should be led and controlled by people with lived experience of disability or health conditions and that they should make up at least 75% of the management board;
• The new organisation should have a democratic structure and be accountable to its membership;
• Member groups should determine the direction of the new organisation and be actively involved in its work;
• Member groups should be controlled by people with lived experience of disability or health conditions;
• The CEO and the majority of staff of the new organisation should be people with lived experience of disability or health conditions.
This stage can take up to a year and cost at least £100k (less in the case of a straightforward merger). Whatever the circumstances, it is clearly important to maintain momentum and not have too protracted a process, because of the uncertainty this can create. However, it is also wise to pay heed to the maxim ‘as fast as we can, but as slow as we must’. Stage 2 includes a number of activities which will often have to run in parallel, with some important interdependencies to manage.

Stage two: Planning and due diligence
- Planning and resourcing
- Ensuring good governance
- Communicating and consulting
- Dealing with staffing issues
- Undertaking due diligence and risk assessment
- Dealing with constitutional issues
- Dealing with pension issues
- Dealing with property issues
- Decision making

PLANNING AND RESOURCING
What kinds of plans are required and how are the costs of the merger going to be met? Relevant to all three models, especially A and C.

The working arrangements put in place for Stage 1 can be continued, but during this stage it will become necessary to expand them (e.g. by including relevant senior staff in the joint management group) and to formalise them (see Ensuring good governance).

An essential mechanism for Stage 2 is a merger project plan. This should cover the following:
- Timetable and key milestones
- Key stages of work
- Governance, management and staffing arrangements
- Briefs for working groups and consultants/advisers
- Dependencies and critical path
- Communication to stakeholders
The plan should be reviewed and updated by the project manager at each joint management group meeting and progress regularly reported to the joint steering group. It provides everyone involved in the merger process with clarity about who is doing what and when. Upfront planning and timetabling are key to the success of mergers.

Two important tasks are the development of a strategic plan and a business plan for the new/merged organisation. Although these plans will not be formally approved until Stage 3 after a decision to merge has been taken, it is essential to prepare drafts to show stakeholders what the new organisation is planning to achieve and how it plans to structure and finance itself. Members cannot be expected to agree to a merger until they know more about the new organisation; similarly funders are going to want reassurance that the new organisation will be sustainable.

The costs of Stage 2 and 3 could range from a few thousand pounds to hundreds of thousands, depending on the merger model adopted and the size of the organisations involved (see Part 1, Question 4). There are four main options for meeting these costs, although a combination of these is the most likely approach:

- **Internal secondments**, e.g. for the project manager. This will be difficult for smaller organisations, even assuming there is a member of staff with the right skills and experience to take on the role.

- **Pro bono help**. There is undoubtedly scope for involving people on a pro bono basis, but finding and managing pro bono helpers itself requires time and pro bono roles must be clearly and discretely defined. Relying on pro bono help for wide-ranging or long-term roles or for very specialist advice is unlikely to be practical. Finding pro bono help is usually a question of drawing on contacts or using one of the organisations set up to broker pro bono help, such as Pilotlight (strategic and business planning), IT4Communities (advice on systems and IT hardware) or Law Works (pro bono legal help). Some major companies like KPMG and GlaxoSmithKline have their own pro bono schemes.

- **Grants**. Some grant support is likely to be essential for all but the wealthiest organisations. Unfortunately, not many trusts and foundations are prepared to fund merger costs. There are, however, some funders who have decided that helping their grantees to merge could be an effective way of increasing their sustainability. Approaching current funders for help with merger costs is therefore one tactic to try.

### Independent review of business plan: Disability Rights UK

The Esmée Fairbairn Foundation was the largest funder of Disability Rights UK’s merger costs. Their funding was in three main tranches. The first was towards initial costs of Stage 2, the second was on further Stage 2 and some Stage 3 costs, but was conditional both on an independent review of the Disability Rights UK Business Plan and on the three organisations agreeing to merge, and the third was assistance with Stage 3 implementation costs.

The Foundation’s consultant interviewed the lead trustees, the CEO designate and the project manager, as well as reviewing the draft business plan and other relevant documentation. He concluded that: ‘There are overwhelming financial and sustainability arguments in favour of a merger. The three organisations have looked carefully at the issues and have either resolved them, or have noted that they need to be resolved and are taking active steps to do so. The new organisation is likely to be able to serve its beneficiaries better with more resource devoted to undertaking activities and less required to cover overheads. There are a number of issues that still need to be resolved and these are all listed in the plan.’ On the basis of the consultant’s report, the Foundation invited Disability Rights UK to apply for further funding for Stage 2 and Stage 3 costs.

### Pro bono help: Disability Rights UK

Disability Rights UK has had pro bono help from over 30 different people. Often the key was making connections with people/organisations willing to help find pro bono helpers through their own contacts. Examples include:

- Legal help with employment law, TUPE, company law, charity law and pension law (through Taylor Wessing, a law firm that Disability Alliance had links with)
- Two interns, who helped with overall project planning (through Prospectus who did the recruitment pro bono)
- Help with due diligence (from a former RADAR trustee with experience of corporate governance)
- Advice on business planning (through a contact who knew of a retired civil servant looking for pro bono opportunities)
- Help with IT and systems development (through IT4Communities)
- Development of a pricing model for contract work (through KPMG’s pro bono scheme)
- Help with building refurbishment plans (through a relative of a member of staff, who worked for an office design company)
- Advice on disability access for the offices (from a former RADAR trustee who works as a disability consultant)

### Summary

There needs to be a merger project plan, as well as a strategic plan and business plan for the new organisation. For most organisations grant funding and pro bono help are going to be required to help resource the merger process, as well as a lot of internal staff time.

### Part twilight: Stage two planning and due diligence

Reserves. Some of the mergers between the larger charities, such as Help the Aged and Age Concern UK, have been entirely funded out of reserves (which is a permissible use of charity funds under charity law). The savings resulting from these mergers make this easy to justify. However, this will not be an option for most organisations.
ENSURING GOOD GOVERNANCE

What should the governance arrangements for Stage 2 be?
Relevant to all three models, but different arrangements will be required for different models.

The joint steering group of trustees convened for overseeing Stage 1 can continue to oversee Stage 2, but there may be a need to widen it to ensure buy-in from both organisations. At this stage, it is useful to refer to the trustees as ‘shadow’ or ‘transitional’ trustees, as they will be taking or contributing to important decisions about the form of the new organisation, but will not necessarily be continuing as trustees in the longer term post-merger.

Clear leadership of the joint steering group also needs to be established at this stage. One option is for the chair and vice-chair to be the two chairs of the merging organisations. On the other hand, there may sometimes be value in having a more neutral person in the leadership role.

Up until the formal decision to merge and the formal transfer of assets, the boards of the ‘original’ charities will continue to meet and satisfy themselves both that their own charity is operating effectively despite all the merger work taking place; and that all the proposed merger arrangements are in the best interests of their beneficiaries and their staff are being well treated during the merger process. See also Stage 3: governance post-merger.

SUMMARY

The arrangements put in place for Stage 1 can be continued, but possibly widened to ensure buy-in and an appropriate balance between the two organisations. Trustees must continue to ensure the good governance of their own organisation.

COMMUNICATING AND CONSULTING

How and when should staff, funders and others be informed and consulted?
Relevant to all models, although there are particular requirements to consult with staff being transferred as part of the merger.

Communicating

As indicated in Stage 1, there is always a dilemma about when first to inform staff, funders and others about the possibility of merger. However, once an initial communication has taken place, it is essential to ensure regular, open and consistent communication with all staff in the merging organisations and with other interested parties. If not, rumour, assumption and misinformation can prevail in place of the mutual trust and openness which are so essential to a successful merger process.

A monthly email update to all staff and a regular newsletter to members and funders are both helpful mechanisms to put in place, along with away days for staff and consultation meetings with members. Appropriate use of social media should also be considered. Most staff will be immersed in the ongoing work of the organisations, whereas those working on merger will be immersed in merger issues. It becomes all too easy to forget how little the former know about what the latter are doing.

What to say to staff

The key question which all staff will be asking is what does it mean for me, and, in particular, will I have a job at the end of it? The challenge for those managing the process is to maintain staff morale by being positive about the benefits of merger and reiterating the vision for the new organisation, whilst not giving any hostages to fortune in relation to the formal consultation processes required regarding TUPE (Transfer of Undertakings (Protection of Employment) Regulations 2006) and restructuring. In particular, it is usually wrong to rule out the possibility of redundancies at this stage in the process, whilst reassuring staff that due process will be followed and, as far as possible, giving them a clear timetable.

One particular area for consultation with both staff and members, as well as other stakeholders, such as service users, is around the strategic plan for the new organisation. As well as covering the vision, mission and objectives of the new organisation, this needs to cover the main activities planned for the future. Consultation on this will help get buy-in to the potential of the new organisation, as well as improving the plan through suggestions about what the new organisation should be doing. Discussing a name for the new organisation can also be part of this process.

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Governance: Disability Rights UK

The steering group in Stage 1 comprised just the three chairs, although other trustees were involved in the workshops and away day. In Stage 2, this was widened to form an interim board of nine trustees from the three charities. All current trustees were eligible to apply; applications were then reviewed by the three chairs in order to achieve the right mix of experience of disability and governance (ensuring that the board was disabled-led i.e. comprised at least 75% disabled people).

After the merger, the board was expanded to 12 people. The six additional trustees from Stage 2 resigned to make place for six trustees to be elected by the members at an EGM. The six were eligible to put themselves forward for election, which four did. Over 40 people in all put their names forward for consideration. Two of the departing trustees longlisted those meeting the specification and the vice-chair and CEO then interviewed them and recommended a shorter list for consideration by the EGM. In the end, three of the original six were elected and three new trustees were elected.

The final stage in the process, following an audit of the skills and diversity mix on the board, was to appoint up to three further members.
Funders and commissioners must be kept well informed, because, if the merger goes ahead, their agreement to transfer the funding arrangement to the new organisation will be required. Whilst in most cases they are likely to view the merger positively, they will expect to be advised of forthcoming changes; indeed this will normally be a condition in grant and contract agreements, and they will not take kindly to news of merger being sprung on them.

**Consulting**

In a merger and also in a restructuring process there are some important formal requirements under TUPE to inform and consult affected staff about the intended process. TUPE applies to the transfer from one employer to another of an undertaking as a going concern. It therefore applies to a merger of charities, given that assets and services (including the employees) of one charity (“Transferor”) will transfer to another charity (“Transferee”).

The employer of any employees who are affected by a transfer has a duty to inform the appropriate representatives of the affected employees long enough before the transfer takes place to enable meaningful consultation to take place. Consultation has to cover when the transfer is to take place and the reasons for it and the likely implications of the transfer for the staff. If there are recognised trade union representatives in place, then consultation must take place with them. If there are not, then consultation should take place through employee representatives elected for that purpose.

**TUPE rights**

Under TUPE the employees have the right to transfer under their existing terms and conditions of employment. If the transferee or the transferor dismissed any staff because of the transfer this would automatically be deemed unfair at an Employment Tribunal. If the transferee or transferor changed the terms and conditions of employment of affected employees because of the transfer, those changes would be likely to be deemed void if challenged by the affected employees. Following transfer there are some limited circumstances in which such a dismissal or change to terms and conditions can be allowed if it is for an economic, technical or organisational (ETO) reason, such as a genuine redundancy situation post-transfer, where there are too many employees to do the work available. However, this is a complicated area and legal advice should be sought before relying on an ETO reason.

Specialist legal or HR advice should be taken on all procedures to be followed under TUPE. The following are some tips when dealing with a TUPE transfer process whether you are the Transferor or the Transferee, as TUPE liability is usually joint and several between the two:

- Employee representatives should be elected at an early stage (where there are not already appropriate trade union representatives in place)
- Inform each member of staff individually about the proposed transfer including relevant dates and parties using a TUPE notification letter which will also inform them of the preservation of their continuity of service, detail proposed changes to their terms and conditions, if any, and set out arrangements for consultation including election of employee representatives
- Engage in proper consultation, meaning no final decisions should be made before discussion with the employee representatives, such as in respect of relocation
- Always be open to the possibility of changes in the planned arrangements in the light of comments received
- Provide the employee representatives with information at all stages of the merger process and facilitate opportunities for discussion
- Notify the employee representatives about any post-merger restructuring plans before the transfer (the transferee will have to carry out a separate and appropriate redundancy consultation process post-merger in any event – see Stage 3)
- Establish a regular employee consultative group, comprising employee representatives and senior management, and hold regular meetings throughout the merger process
- Agree arrangements for involving all other staff with the employee representatives.
- At the end of the process confirm the final arrangements for the transfer

**SUMMARY**

There is a continuing need throughout this stage to communicate well with trustees, staff, members, funders and other key stakeholders. At the same time, there are legal requirements to inform and consult staff being transferred under TUPE and specific mechanisms need to be in place for this. Under TUPE staff have the right to transfer under their existing terms and conditions of employment. Professional advice should be taken on this issue.

See also Stage 2: dealing with staffing issues.
DEALING WITH STAFFING ISSUES

There are three main staffing issues to consider at this stage prior to transfer and restructuring being implemented in Stage 3: recruiting the CEO, developing the staffing structure and developing terms and conditions. The last two issues are relevant to all three models; the first is particularly relevant in a full merger (model A).

It is important that staffing issues are handled as fairly and openly as possible in a merger, because this will set a standard for how the new organisation is proposing to operate in the future.

Recruiting the CEO

In a unified full merger (model A), the sooner the arrangements for appointing the CEO designate of the unified organisation can be agreed by the joint steering group the better. This will ensure clear and strong leadership in potentially difficult times, as well as resolving what could otherwise become a source of tension and uncertainty.

There could be redundancy costs, timing issues and difficult transitional periods involved, depending on which approach is followed, since the existing organisations will continue to have to be managed. The joint steering group will therefore have to agree the severance terms and notice periods it is prepared to offer the unsuccessful candidate, and ensure that it has budget for this. If the CEO is appointed prior to merger being formally agreed, then this should be on a designate basis, with them retaining their current CEO role, in case the merger does not take place.

Ideally, the issue should be discussed between the two CEOs and their chairs in Stage 1, but this is not always possible. Indeed, there have been instances in recent mergers, where, unbeknown to either CEO, the joint steering group has commissioned a recruitment company to search for a new CEO for the new organisation. There have also been cases where a new CEO has been appointed for an organisation already in advanced discussions about merger, without being told anything about the plans for merger. Both scenarios are very bad practice.

Recruitment consultants

Involving an independent consultant can help with the management of these potentially difficult issues. If there is to be a competitive recruitment process, then it can be helpful to involve a recruitment consultant. For example, Prospectus was involved on the appointment panel that interviewed the CEOs of the Rainer Foundation and Crime Concern for the post of CEO for the merged organisation (Catch 22).

In a group structure (model C), current CEOs are likely to retain their roles, but their formal reporting lines will change from being just to their own board to being to the CEO of the holding company. Whilst this can feel like demotion for the member of staff concerned, if it is sensitively handled by the CEO of the holding company and a good relationship has been established, it need not be a difficulty.

Developing the staffing structure

Although people will not be appointed to posts in the new structure until after transfer and formal consultation have taken place, it is helpful to develop plans for the new structure, including a pay structure, during Stage 2, so that the affordability of the structure can be assessed as part of the business planning process.

This also means the Senior Management Team can be appointed on a designate basis prior to merger taking place and can then help with implementing the new structure, although, as a result, senior managers may then be in the invidious position of knowing they are not going to have a senior post in the new structure. It can also mean that the CEOs have a sense of whether there is a potential post for them in the event of not being appointed CEO.

Informal consultation should take place on the staffing and pay structure through the employee consultative group, so that staff’s views can be taken into full account at the formative stage. Draft job descriptions and person specifications should also be developed and consulted on. It is important to be clear that at this stage consultation is being done by the transferor, not by the transferee and that any redundancies at this stage would be automatically deemed unfair, if they were in any way connected with the merger.

Developing terms and conditions

Again, although terms and conditions will not be formally agreed until Stage 3, a great deal of preparatory work can take place in Stage 2 in consultation with the employee consultative group, including:

- Comparison of the existing terms and conditions of the transferors, noting significant differences
- New terms and conditions for the transferee, either based on one of the transferors, on a combination of the two or on good practice from elsewhere
- Comparison of the existing terms and conditions of the two transferors with those proposed for the transferee
The results of this work will provide a good basis for initial discussions with staff about their future terms and conditions post-merger. As indicated, under TUPE staff have the right to maintain their current terms and conditions following transfer and this has to be the starting point for any discussions with them. The transferee is unlikely to be able to level up all terms and conditions, but there may be some conditions, such as hours of work, holidays and sickness leave, where a degree of levelling up or harmonisation can be achieved by agreement with staff without too significant a financial impact. With others, such as salaries and pension contributions, this is unlikely to be possible for most organisations, so there may have to be different terms and conditions for some time, until staff turnover and other changes result in greater consistency across the organisation. (see Stage 3: transfer and restructuring).

**SUMMARY**

Although staffing arrangements cannot usually be finalised until after the merger has taken place, the approach to be adopted needs to be thought through in Stage 2, so that staff can be reassured about the implications of the merger for them and the process to be followed. TUPE has important implications for the process to be followed. Professional advice should be taken on this issue.

**UNDERTAKING DUE DILIGENCE AND RISK ASSESSMENT**

How should the due diligence process be undertaken, in order to minimise risk to the merging organisations?

Relevant to all models, but under model B the organisation taking over will want to undertake more detailed due diligence than the organisation being taken over.

Due diligence is the process which both organisations need to undertake to assure themselves that a merger is in their beneficiaries’ best interests.

The approach taken to due diligence will vary according to the circumstances of the merger. If it is a friendly merger, where two organisations have already been collaborating, know each other well and are now planning to become one, then the due diligence process can be done jointly on behalf of both organisations (but reporting to each board separately). If on the other hand, it is more of a rescue merger where, for example, one organisation is in financial difficulty and is seeking a partner to take it over, then the stronger organisation will want to carry out its own due diligence to satisfy itself that it would not be taking on any unforeseen liabilities. The weaker organisation will probably just want to check the good standing and good faith of the stronger organisation.

**Due diligence process**

It often makes sense to undertake this process in two stages:

- High-level risk assessment to identify the biggest potential risks involved in the merger. This should be undertaken in Stage 1, as part of the exploration of issues and potential deal breakers with the key players.
- Detailed due diligence in Stage 2 to confirm that the high-level risks can be satisfactorily addressed and then to carry out a series of commercial, financial and legal checks of the two organisations to establish there are not any unforeseen risks or issues which the organisations were not aware of. These could include contracts, property obligations, employment tribunals, pension liabilities, debtors and creditors and claims. The Charity Commission checklist in Annexe 3 of Making Mergers Work provides a helpful framework.

In all circumstances, the approach taken to due diligence should be proportionate. Trustees are responsible for deciding on the appropriate level, given the nature and scale of the risks involved. Trustees may reasonably take the view that liabilities beneath a certain threshold level, typically between 5-10% of the turnover of the transferor, are immaterial in the context of the value of the assets to be transferred. If the due diligence is being conducted by an independent firm of auditors, it is a good idea to ask them for their professional
opinion on the organisation they are checking – in particular on issues such as potential liabilities, inappropriate use of restricted funds and solvency, as well as checking all the usual points in a due diligence checklist.

A key source of information will be the most recent annual accounts. If necessary, this can be supplemented by access to the auditors’ working papers, provided the necessary authorisation and what are known as ‘hold harmless’ letters are agreed by the parties involved to protect the interests of the two organisations.

**SUMMARY**

The Charity Commission provide a useful checklist, but the approach followed should always be proportionate to the risks involved. It is for the trustees of each organisation involved in the merger to decide what they feel is appropriate.

**Due diligence: TACT**

TACT undertook its own due diligence of the organisations it was taking over. Relevant finance, HR and services staff looked at the business, staffing and service delivery aspects of the organisation with a particular eye to issues like:

- Contracts
- Grants, including use of restricted funds
- Employee claims or grievances
- Quality of service delivery

In some cases, this has resulted in a decision not to proceed, e.g. because of concerns about the quality of the organisation’s services and its financial position.

The organisation being taken over has normally just wanted to satisfy itself about the financial strength and good standing of TACT. However, in one case the organisation’s lawyers insisted on doing a detailed due diligence of TACT, which resulted in the smaller organisation spending more on due diligence than TACT itself.

Source: author interview with CEO, TACT

**Due diligence: Disability Rights UK**

A due diligence working group was formed, chaired by a former trustee of RADAR with experience of corporate governance, and comprising the treasurers of the three transferor charities and of the transference, as well as a pro bono adviser and an intern.

**Stage 1.** The working group undertook an initial high-level review which identified five potential ‘showstoppers’:

1. the financial situation of each of the charities, including their dependence upon restricted funding contracts, many of which were due to end in March 2012
2. the deficit in RADAR’s defined benefit pension
3. issues surrounding RADAR’s current lease and whether RADAR’s current premises were the best site for the new organisation
4. the costs of the unification project and the viability of getting funding for those costs
5. initial lack of agreement amongst the three charities and their boards concerning the values/ vision/philosophy and mission of Disability Rights UK.

**Stage 2.** Each of the issues identified in Stage 1 was addressed by more detailed work. The working group then used the Charity Commission’s checklist for due diligence as its reference point to ensure that all appropriate areas of the three charities’ existing operations were reviewed. It did not identify any significant issues beyond those identified in the Stage 1 report.

**Reviews.** An independent review of the Disability Rights UK Business Plan and the merger project was commissioned by the Esmée Fairbairn Foundation, one of the funders in Stage 2, before it decided whether to consider further funding (see Stage 2: planning and resourcing).

An independent due diligence review was also commissioned by Disability Rights UK and the three charities from a firm of auditors, Goldwins, following a tendering exercise amongst the auditors of the three charities. This review involved the examination of the following documents with a view to highlighting areas of particular concern for the three boards to consider before they made the decision as to whether or not to recommend unification to their respective AGMs:

- Stage 1 due diligence report
- Stage 2 due diligence report
- Draft business plan together with Esmée Fairbairn Foundation review
- Financing and overseeing unification project costs
- Audited accounts for 2010
- Draft audited accounts and files for 2011

Goldwins’ brief was to carry out a critical, yet proportionate, overview of the information made available without duplicating work carried out by others. The assignment included an examination of the above documents to establish that the key facts and assumptions made had supporting documentation and were both valid and robust.

The results of all this due diligence were reported to the three boards of the transferor charities prior to their deciding whether to recommend merger to their respective AGMs.

**Risk register.** In parallel with this process, a risk register for the project was also developed, comprising 50 different risks relating to different aspects of the project. Mitigations were put in place for each risk and each risk and mitigation was assigned a score to determine its significance. The list and the scores were reviewed every month by the project board. The trustee board reviewed the top 10 risks every two months.
DEALING WITH CONSTITUTIONAL AND OTHER LEGAL ISSUES

What are the constitutional and other legal issues that need to be addressed in a merger?

Note: This section focuses on incorporated organisations (e.g. charitable companies limited by guarantee) which is likely to be the most common situation in civil society organisation mergers. Different arrangements apply for charitable trusts or other unincorporated organisations. Legal advice should be taken on the issues raised.

Constitutional work for a merger
- Initial review of legal position
- Choice of legal model
- Drafting the constitution of the merged organisation
- Transfer document giving effect to the merger by the completion date

Implementation then takes place in Stage 3.

Initial review of legal position
This will usually be done as part of the exploration of issues in Stage 1 (see Seeking professional advice on key issues). It involves establishing whether the merging organisations have the power to merge in their governing document; have compatible objects; and have restrictions on the use of their funds. If they do not have the power to merge, before proceeding they would have to amend their powers at a General Meeting of the Members or, in the case of charities or community interest companies, seek the assistance of the Charity Commission or the CIC Regulator.

Compatible objects are particularly important if one or both of the merging organisations are charities, as charity assets must continue to be used for the purposes set out in the charity’s objects. If the objects are completely incompatible, merger is unlikely to be a viable option. What is more likely is that, for example, the geographical scope of the charities is incompatible. If one is limited to operating in England (as was the case with Disability Alliance and RADAR) and the other is worldwide (as was the case with Disability Rights UK and the National Centre for Independent Living), the new charity would have to treat the ‘England’ charities’ assets at the time of the merger as restricted funds that can only be used in England. A simpler option is to amend the objects of the transferor charity(ies) to apply worldwide. Similarly, under model B, the charity taking over may need to widen its objects to embrace the scope of the charity it is taking over (as was the case with TACT with one takeover).

Changes to a charity’s objects requires the prior written consent of the Charity Commission under Section 64 of the Charities Act 1993; then a special resolution at a General Meeting; then providing Companies House with details of the resolution within 15 days of it being passed; and then providing the Charity Commission with confirmation of the date the special resolution was accepted at Companies House.

Some charities have restrictions on their sources of income or on their properties, which can raise specialist issues which are best discussed with the Charity Commission at an early stage.

Choice of legal model
The work involved at each stage will vary greatly, depending on the model of merger adopted.

The choice of model (see opposite) is likely to depend as much on policy as on legal issues. From a legal point of view, models A1, B and C1 (all forms of takeover) are the simplest (and the cheapest) option; however, there may be strong opposition to this approach from the party being taken over even though, externally, people are unlikely to be aware of the legal form the merger took, especially if under the unified model (A) the resulting organisation has a new name and brand, or, if under the group structure model (C), the original names are maintained. Other major influences are the pension position or the ease of transferring assets – in some cases the costs involved, or legal barriers, may pose a significant obstacle. In these cases it may be better to retain the original organisation and either form a group structure or retain it as a dormant subsidiary.

Five types of model
- A1: Unified full merger – Organisation A transfers its assets and activities to Organisation B and then Organisation B has a new name and identity (a form of takeover)
- A2: Unified full merger – Organisation A and Organisation B transfer their assets and activities to a new organisation C and then either dissolve or become dormant subsidiaries of Organisation C (a new entity)
- B: Unified takeover – Organisation A transfers its assets and activities to, and becomes part of, Organisation B (a straight takeover)
- C1: Group structure – Organisation A continues to exist but becomes a wholly owned subsidiary of Organisation B (a form of takeover)
- C2: Group structure – Organisations A and B both continue to exist, but both become wholly owned subsidiaries of a new holding company, Organisation C (a new entity)

Drafting the constitution of the merged organisation
The work involved will depend on the model adopted. For example, models A2 and C2, where a new organisation is being created, require a new constitution to be drafted, whereas models A1 and C1 (both forms of takeover) involve amending existing constitutions and model B (straight takeover) may not require any constitutional changes at all.

A new constitution usually needs to be drafted, with the Charity Commission at an early stage. For organisations that are charities, seek the assistance of the Charity Commission or the CIC Regulator. Other major influences are the pension position or the ease of transferring assets – in some cases the costs involved, or legal barriers, may pose a significant obstacle. In these cases it may be better to retain the original organisation and either form a group structure or retain it as a dormant subsidiary.
Dissolve or become dormant?

If the organisations have chosen models A or B (the unified model), they will have to decide on the future of their own organisation – in particular, whether to dissolve it or to make it a dormant subsidiary of the new organisation. The advantage of the latter for a charity is that it means that any legacies left in the name of the charity will still come direct to it and can be passed on to the parent charity. This can be achieved in other ways through the Charity Commission’s register of merged charities, but the risk of this approach is if the wording of the legacy specifies ‘provided the charity still exists’ and the charity has been dissolved. There may also be advantages in continuing with certain contracts, such as the dormant subsidiary continuing as the tenant in a lease with favourable terms (and then letting the property to the parent charity). Likewise, in the case of a single employer defined benefit pension scheme, there can be benefits in maintaining the dormant charity as the Approved Employer for the scheme (see Stage 2: dealing with pension issues).

Transfer document giving effect to the merger by the completion date

Having agreed to merge, the final stage in the process is the drawing up of a transfer document for signing by authorised signatories of all the organisations involved. The nature and sophistication of the document will depend on the nature of the organisation (e.g. trust, association or company), the nature and number of the assets involved, and whether the transferor(s) will be dissolved. The transfer document should have a schedule of all staff transferring. There is also a requirement before transfer to supply employee liability information. The formal documentation may also contain warranties and indemnities to manage the risk of the parties involved. Charitable trusts may simply be able to distribute all of their assets to the recipient charity, which will dissolve the trust automatically. Companies (e.g. charitable companies limited by guarantee) will require wider formal agreements to transfer, particularly if the transfer takes place as part of, or immediately prior to, a formal winding up of the company. Both documents will set a formal completion date, which should be planned to allow stakeholders to be informed in advance. If necessary, the document will also make explicit any assets that are excluded from the transfer (such as the lease referred to in the example above).

SUMMARY

This is one of the main aspects of the merger process where legal advice will be required, both in making constitutional changes (if required) and in completing the process of merger. Depending on the circumstances the Charity Commission, CIC Regulator and/or Companies House will also need to be consulted and/or informed.
DEALING WITH PENSION ISSUES

What are the implications of mergers for pension arrangements in general and for defined benefit schemes in particular? Relevant to all models that involve transferring staff from their current organisation to another organisation.

Pensions are often a potential showstopper in merger discussions. They are a very technical area and it is essential to take professional advice on the issues involved and how best to address them. There are three main issues that can potentially arise:

- **Pension contributions.** Any employees subject to TUPE will either have the right to maintain the existing employer pension contributions agreed under their contracts of employment, if in a personal pension scheme or a group personal pension scheme, or will be entitled to pension contributions from the new employer matching the employee’s contributions (up to 6%) if currently in an occupational pension scheme when their employment is transferred. Currently, this could be anything from 0% to 20% of their salary, depending on the scheme and what employment contracts provide. In due course a minimum contribution of 3% will be required from employers under new legislation due to be implemented over the coming years (the implementation timetable for this varies depending on the size of the organisation).

- **Pension scheme debts.** If one of the organisations has a defined benefit pension scheme (which pays members a fixed level of income throughout retirement, usually based on a proportion of an employee’s final salary multiplied by their service), then the debt on the scheme will effectively be inherited by the new organisation. The scheme could be a single employer defined benefit pension scheme or a multi-employer scheme, such as the one run by the Pensions Trust for charities or one for a federation of charities such as the YMCA. Most defined benefit pension schemes have now been closed to new entrants, but can often be heavily in deficit. In a recent article in Third Sector (1/05/12), the total pension deficit faced by charities was estimated by the actuarial firm Spence & Partners at £5bn. In the same article, Barnardo’s pension deficit alone was reported as being £73.4m. Debt levels on multi employer schemes are increasing, because the debts of organisations closing down that are unrecovered by the trustees of the scheme are classified as ‘orphan liabilities’ and can then effectively be swept back up by the scheme and split between the still standing employers in the scheme.

- **Avoiding crystallisation.** Where a merger is taking place that involves a change of employer, and there is a multi employer defined benefit scheme, this could potentially ‘crystallise’ the employer’s debt on the scheme (known as a Section 75 debt) and/or a winding up of the scheme. This debt can often amount to a considerable sum of money as it covers historic liabilities, so it does not necessarily matter that there might only be a handful of current scheme members. This debt would have to be paid by the transferor unless another way of dealing with it under the legislation can be agreed with the trustees of the scheme.

Pension scheme deficits and potential crystallisation are serious barriers to merger. Changes to current legislation are being discussed with the Government by NCVO and others to try and overcome these barriers, but this will take time to achieve results.

Meanwhile potential ways of addressing the three issues highlighted are:

- **Pension contributions.** These must be allowed for in the new organisation’s budget. Because of employees’ rights under TUPE it is quite possible that the two staff groups transferring may be entitled to different levels of employer contributions (see Stage 2: dealing with staffing issues).

- **Pension scheme debts.** The employing charity and the trustees for the pension scheme will have to have agreed a recovery plan for the scheme. The significance of a merger in this context is first that the act of merger will affect the strength of the employer covenant (hopefully for the better) and secondly that the new organisation will, in practice, have to take on the responsibility for financing the recovery plan in future years. Apart from exploring ways of stopping the build-up of the scheme’s liabilities, there are three main elements involved in negotiating a recovery plan: these are the annual deficit contribution, contribution to the expenses of the scheme and the contribution to the Pension Protection Fund (PPF) levy. A number of different factors will inform these negotiations, including:
  - The timescale for the recovery plan
  - The strength of the employer covenant
  - The actuarial estimate of the provisions the scheme needs to make
  - The state of the financial markets

- **Avoiding crystallisation.** If the transferor is involved with a multi employer scheme there are broadly two main ways of dealing with the problem of a section 75 debt trigger if payment of the buy out debt is not an option. The first is for the transferor to continue as a dormant subsidiary of the transferee and to remain as the ’statutory employer’. This means that the debt trigger under legislation will be avoided; however, assuming the transferor’s move to the transferee, the scheme trustees may be concerned about what the Pensions Regulator refers to as “scheme abandonment”. This may necessitate discussion with the pension scheme trustees and potentially agreeing some level of guarantee or support from the transferee to the scheme (for
example though PPF guarantee documentation). The second is to seek agreement to one of the permitted methods of dealing with a Section 75 debt trigger under legislation with the scheme trustees and possibly the Pensions Regulator. These arrangements broadly allow for the assignment of the liability in respect of the scheme to another scheme employer and/or to the transferee, but these legislative arrangements are very specific and there are many tests that need to be satisfied before they can be put in place. Both options are complex and require involvement of lawyers. Even in a single employer scheme where a Section 75 debt might not trigger, the scheme trustees may still have concerns regarding scheme abandonment and employer covenant, so a dialogue will still need to be entered into.

If negotiations on these issues break down at any stage, it is worth bearing in mind that the pension trustees can refer the matter to the Pension Regulator, who has very wide powers to make organisations provide adequate support for pension schemes and who may choose to intervene. This is something to be avoided.

**SUMMARY**

Pensions are often the showstoppers in merger discussions. Technical advice must be sought on the issues that arise if the organisation transferring staff has a defined benefit pension scheme, where the debt on the scheme is inherited by the transferee and the risk of crystallisation arises as a result of the change of employer. There are ways of addressing these problems, but they involve making provision for the debts in the transferee’s business plans, as well as entering into complex agreements with the pension providers, which will incur legal costs. Professional advice should be taken on this issue.

**DEALING WITH PROPERTY ISSUES**

Specific, and potentially complex, issues can arise in relation to property – for example, if one of the merging organisations has a lease on a property, which prohibits sub-letting.

Some of the potential issues to consider are:

- Could the transferee be assigned the lease? If not, could it become a tenant of the transferor?
- If the lease is a protected tenancy under the Landlord and Tenants Act and compensation is payable if the landlord wants to terminate the lease early, how can the transferee best ensure this protection is maintained?
- If the landlord has redevelopment plans for the property is there the potential for agreeing a compensation package in return for early exit?

Depending on the circumstances, these property issues could become a reason for adopting a particular legal model for the merger (e.g. model A1 rather than A2) or for maintaining the transferor as a dormant subsidiary (i.e. model A2), so that the lease can continue undisturbed. It is advisable to seek professional advice where assignment of leases are involved, especially if there are plans to close down the organisation that is the current tenant, as the landlord has the right to object to the closure under the Companies Act.

Any properties being transferred as part of the merger process must be valued at fair value and go on to the balance sheet of the transferee.

**SUMMARY**

Check whether the merger will affect any current property arrangements and assess whether these have implications for the legal model adopted for merger.

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**Pensions: Disability Rights UK**

RADAR had a single employer defined benefit pension scheme with an estimated deficit of over £600k. An 18-year recovery plan involving payments of £82k p.a. was agreed with the Pension Trustees. This will be reviewed after three years in the light of market and actuarial considerations and an assessment of the strength of the employer covenant post-merger. Provision for these payments has been included in Disability Rights UK’s business plan.

Prior to TUPE on 31 December 2011, the Pension Trustees, RADAR and Disability Rights UK agreed in principle to put in place PPF guarantee documentation guaranteeing payment of any liability that might later crystallise. The documentation was finally agreed in early 2012.
DECISION-MAKING

What should the process be for obtaining agreement to proceed (or not) with the merger? Relevant to all models, but membership organisations will have the added complexity of securing agreement from their members at a General Meeting.

The results of all Stage 2 work should be reported to the boards of the merging organisations with recommendations about merger. This report should cover the following topics, in each case outlining proposed arrangements and highlighting the implications for the transferor’s beneficiaries, members, trustees and staff:

- Rationale for merger
- Benefits for service users
- Membership arrangements and fees
- Governance and management structure
- Financial arrangements and plans
- Results of due diligence
- Risks and risk mitigation
- Implementation plans
- Plan B if merger not agreed

Assuming the report is recommending merger, it should also include the resolutions required to give effect to it. For a unified merger (models A and B) these would cover:

- Transfer of the entire business, assets and liabilities to the new/other organisation on a specified date (or such other date as the new organisation decides, to give flexibility)
- Changes to the Articles of the transferor to amend objects (if required to make consistent with the transferee) and to amend arrangements for membership and trustees (if required to make the transferor a dormant subsidiary of the transferee) or to dissolve the transferor
- A ‘belt and braces’ resolution to authorise the board of the transferee to make any further decisions required to give effect to the merger, provided such decisions are unanimous (thus avoiding the need for a further General Meeting)

In the case of a group structure (model C), there will be a series of agreements between the constituent organisations specifying how they are to work together in one group. These will cover areas such as services, fundraising, branding, staffing and property (see RNIB case study, p. 63).

In the case of membership organisations controlled by their members, recommendations on merger will need to go forward to their members for approval at a General Meeting.

SUMMARY

A detailed report should go to the boards of the merging organisations covering all the issues examined in Stage 2 and, if merger is being recommended, the resolutions required to give effect to the merger. In the case of membership organisations relevant resolutions should be put to the General Meeting for approval.
In most mergers this stage is the beginning of the journey, not the end. In the case of a straight takeover (model B), it may simply involve the creation of a new department within the larger organisation, which could be a relatively straightforward process. However, in a unified full merger (model A), it will usually take up to a year and could cost up to £300k or more, depending on the extent of the changes required. If implementation is not seen through properly, the full benefits of merger will not be realised.

One of the most important differences between this stage and earlier stages is that it involves all staff, rather than just the members of the joint management group. A particular challenge, therefore is continuing to do the day job whilst introducing new ways of working across the whole organisation. The knock-on effects of a merger on staff working in finance, office management, IT, membership administration and communications can be considerable. This is why it is vital to maintain momentum, even though there will be considerable capacity issues. Some observers say a merger does not end until after several years.

Preparatory work on many of the activities will have started during stage 2, but usually they cannot be completed until merger has been formally agreed and funding has been secured (or released, if it was subject to the merger going ahead).

**Stage three: Implementation**
- Finalising constitutional and legal issues
- Transfer and restructuring
- Finalising governance
- Integrating office arrangements
- Integrating systems
- Integrating financial arrangements
- Integrating cultures
- Rebranding and integrating communications
- Launching
- Evaluation
FINALISING CONSTITUTIONAL AND LEGAL ISSUES

Following the decision to merge, what are the final legal processes to complete the merger? Relevant to all models in different ways.

This involves the “sweep up” of completing the legal title to assets (e.g. property, vehicles and bank accounts), formally notifying third party funders, beneficiary organisations and service providers (which may involve the transferor, transferee and third party entering into novations of existing arrangements), and formal assumption of liabilities of the transferor by the transferee, which may be achieved by an indemnity. If the transferor is closing, it will also be necessary to complete the final steps of a formal company dissolution with Companies House, and, if a charity, file final accounts with the Charity Commission. Companies House, the Charity Commission and the CIC Regulator should be informed once the merger has taken place, as appropriate.

SUMMARY

Having agreed to merge, there are a number of legal titles to complete and third parties to be formally notified.

TRANSFER AND RESTRUCTURING

Following the decision to merge, what are the arrangements for transferring staff, introducing a staffing structure for the merged organisation and finalising terms and conditions of employment? Relevant to all models in different ways.

TUPE letter

Whilst not a legal requirement, it is good practice to ensure that every member of staff receives their TUPE letter confirming their employment with their current organisation will transfer to the new organisation on the specified day. They then know, after months of discussions, that the merger is finally about to take place. The letter will make clear that although their employer is changing, their continuity of employment will be preserved and their contractual terms and conditions of employment remain unchanged.

Restructuring

Following transfer, if the transferee is proposing to restructure and to make staff redundant, then it needs to follow individual redundancy consultation processes with the individuals at risk of redundancy. Furthermore, if there are 20 or more employees at the transferee organisation who are at risk of redundancy in a planned restructuring, the transferee will have certain statutory collective consultation obligations in addition to individual consultations. Specialist legal or HR advice should be sought if dealing with significant restructuring.

Information on Restructuring for staff

As part of the post-transfer restructuring, the following information should be circulated to all affected employees:

- Proposed new staffing structure, including numbers of posts in the future compared with present arrangements
- Proposed job descriptions and person specifications
- Proposed slotting in criteria
- The selection criteria used to determine who will be put at risk of redundancy out of a pool of employees doing substantially similar roles
- Proposed interviewing arrangements and timetable (if applicable)
- Proposed redundancy terms, including option of voluntary redundancy (if applicable)

The above information should form part of the individual redundancy consultation processes and, if applicable, the collective consultation. Legal advisors can advise on the required form and length of the consultation processes given particular circumstances.

The proposed slotting in criteria and the selection pool criteria are likely to be the most controversial aspects of the process. Different types of posts will be very differently affected. Staff involved in service delivery will often be slotted in unless the new organisation is proposing to rationalise or integrate its range of services. Staff involved in support services, such as administration, reception and finance, are likely to have to compete, since this is usually the main area where savings will be made in a merger.

The selection pool criteria used to ascertain those employees at risk of redundancy will need to be fair and objective and will include a large number of factors to be considered such as (but not limited to) performance, disciplinary record, length of services, skills and qualifications.

Recruitment

The actual recruitment process will normally follow the same process used by the transferors, but where they have different practices common procedures will need to be agreed, e.g. for application forms, interview scoring etc. The interview process itself is often time-consuming, because, in a unified model (A), it can involve all staff (apart from those being slotted in).

The recruitment process must be seen as open, fair and objective. At the same time, there is undeniably an additional dynamic in a merger, which is how many staff from each transferor get jobs and at what level. If one organisation secures all the top jobs, this is likely to be viewed very negatively by the other – and yet it is essential that those appointed have the experience and ability to do the job. There is no easy answer to this issue, but particular care needs to be taken to ensure that job descriptions and person specifications do not purposefully favour staff from one organisation over another.
Those employees who are ultimately made redundant should have the right to appeal to trustees unconnected with the management of the restructuring process. An estimate of redundancy costs will have to be made earlier in the process as part of merger budgeting, but it is only at the end of the process that the actual redundancy costs will become known, depending on the salaries, age and length of service of those being made redundant. Further cost may be incurred should any aggrieved employees pursue employment claims as a result of anything that happened in the TUPE or restructuring processes, although the risk of this will be mitigated if the correct procedures are followed.

New terms and conditions of employment

Discussions with employee representatives about changes to terms and conditions should have begun as part of the TUPE consultation process (see Stage 2: communicating and consulting). Following transfer, any employees who have stayed in a similar role should still be on their original terms and conditions. If for harmonisation purposes the transferee wants to change those terms and conditions, one approach is for those employees to be asked to agree to terminate their existing employment contracts and re-engage on new contracts, so it is more difficult for them to challenge any such changes in future. By offering some better provisions in return for accepting some detrimental changes the transferee is more likely to get the employees to agree. In some mergers more informal methods are used to reach agreement to new terms and conditions, although technically these run the risk of being challenged by staff at a later date, unless there is a termination and re-engagement as mentioned above.

If any employees would have been made genuinely redundant but accept suitable alternative employment or interview successfully for a new role, then the same process should happen – i.e. terminating the employee’s existing contract and immediately re-engaging in the new role.

SUMMARY

Great care must be taken, post-transfer, in restructuring and either appointing staff to the new structure or making staff redundant, ensuring that the requirements of TUPE and employment law are followed throughout. Professional advice should be sought.

FINALISING GOVERNANCE

What needs to be done to finalise governance arrangements post-merger and, as far as possible, ensure that all the trustees of the merging organisations remain positive? Relevant to all models.

If the organisations involved in the merger are membership organisations, they will need to arrange for the transfer of members to the new organisation. This will involve contacting members individually to obtain their agreement under the Data Protection Act for their details to be transferred.

In Stage 1 a joint steering group will have overseen initial merger exploration and in Stage 2 this may have been formalised into a shadow Board, as important decisions about the direction and structure of the new organisation begin to get made. Once merger has taken place, these arrangements will need to be finalised. In a membership organisation with a democratic structure, the members who have transferred should be given an opportunity to elect some of the trustees early on in the life of the organisation. However, maintaining continuity at this crucial time of change is also important, so designating some trustees as transitional trustees, spanning the pre- and post-merger period, is advisable (see Stage 2: ensuring good governance).

During Stages 1 and 2, under model A, the need for parity of representation of the merging organisations is usually important. Likewise under models B and
C, it is common practice to have some trustees from the transferee on the board of the new organisation. However, care needs to be taken to ensure that the board does not become too large. Also, once the merger has settled down a skills audit should be conducted, so that, if necessary, skills gaps can be filled either through appointments or elections. As a rule, allegiances to particular merging organisations start to reduce very quickly after the merger has taken place.

In the early months of merger, the new board will need to satisfy itself that all aspects of implementing the merger are being satisfactorily managed, as well as keeping the external policy, legislative and financial environment under review. Although the Articles of the new organisation will have been agreed during Stage 2, not all aspects of governance will be covered in them. Some kind of protocol or standing orders document will also be needed covering items such as:

- Trustee role description and person specification
- Procedures for electing or appointing trustees
- Trustee code of conduct
- Trustee appraisal
- Committee structure and terms of reference

Good models for this may already be available from the transferors.

**SUMMARY**

The final composition of the board and an operating protocol need to be agreed, taking into account both the requirements of good governance and the sensitivities of the organisations involved.

**INTEGRATING OFFICE ARRANGEMENTS**

After security of employment, location of employment is probably the next biggest issue for staff. This is relevant to all models.

Choice of office location can give an important message. In a unified full merger (model A) the ideal arrangement is to move to a new office, in the way Age UK have done, so that the identity and working practices of the new organisation can be reflected from the outset. More common arrangements are that the two organisations:

- continue to base their staff in separate offices (which makes working as one organisation a real challenge)
- continue to maintain two offices, but base different departments in different offices (which at least means different staff groups get integrated and, if the offices are in different parts of the country can give a positive message about not being, say, London-centric)
- co-locate into one of the organisation’s offices (perhaps through giving notice to a tenant or, where numbers are small, there being spare space available)

It will often take time to complete new office arrangements. In the interim it is important that the CEO visits all staff and even spends time working in the office of the transferee to begin the process of integration.

In most cases, it is preferable to rent rather than purchase property, as there will be so many unknowns about the future size of the new organisation and the future state of the property market. Maintaining maximum flexibility is the best course of action.

Where staff travel further, or even have to move house, a series of financial issues arise regarding relocation expenses and costs. A new office location may make it impossible for some staff to continue to work, in which case they can claim constructive dismissal and compensation. Some staff will have contracts giving them the right to work at a particular office which means they may have to be compensated if their journey to work costs more.

Any form of joint office arrangements immediately gives rise to a host of practical questions which need to be resolved as quickly as possible. These include:

- Common telephony and email
- Reception arrangements and dealing with enquiries
- Shared or linked (but not necessarily yet integrated) websites

**SUMMARY**

The decision on future office arrangements is likely to be heavily constrained by finance and by staff’s terms and conditions, but within the resources available, it is important to be sensitive to the messages which the decision gives staff and the practical impact on working arrangements.
INTEGRATING SYSTEMS
If the new merged organisation is going to realise its potential for achieving efficiencies then it must have integrated systems, as well as integrated staffing. Relevant to all models, particularly full mergers (model A).

The two most important systems to integrate are likely to be a finance accounting system and a customer relations management system. Longer-term plans for improving systems should also be developed, bearing in mind that not everything can be done at once. Some of the main steps involved in introducing new systems are:

- Agreeing the brief
- Defining the criteria for the new systems
- Consulting and involving the future users of the system
- Putting in place appropriate working arrangements, including a project manager for each system
- Reviewing system options, including demonstrations to future users
- Selecting preferred options
- Migrating the data
- Testing the new system
- Training users on the new system

It can be very helpful to involve external pro bono advice on a project such as this – for example in preparing a project initiation document and in helping select the best system. IT4Communities can help find volunteers to match organisations’ requirements.

SUMMARY
A carefully planned approach to the development and implementation of new systems, particularly for accounting and customer relations management is essential; this may be a good area for getting pro bono advice.

Criteria for new systems: Disability Rights UK

Efficiency
The merger is a unique opportunity to review all three charities’ systems; pooling any strengths and developing more robust systems to reach more disabled people and to scale up our services. Developing and implementing new, coherent systems will allow us to create a more efficient and resilient organisation.

Simplicity
Currently each charity uses systems that are in no way integrated and often archaic and simply not up to the job. Most systems are hand driven and very little automation exists which is a waste of staff time and resources. ICT and systems should make people’s jobs easier and not add another layer of work. In addition, as we plan to increase our fundraising activities to involve applying to trusts and foundations, government departments, corporate partners and relations and individuals, an integrated customer relations system is crucial to ensure this work is simple and effective.

Innovation – reaching more disabled people
As well as making the work we do now more efficient, systems could be introduced to allow us to do new things and reach more disabled people. For example, evaluation software could allow us to quickly analyse the impact of projects and make it easier to secure future funding. In addition, having an electronic point of sale for publications will encourage more people to access our various guides.

Accessibility
Any systems developed will have to be fully accessible for people with visual impairments. In addition, we must have a firm policy on provision of all materials in accessible formats, audio, large print, easy read etc.
INTEGRATING FINANCIAL ARRANGEMENTS

How should finances and funding be managed pre and post merger? Relevant to all models, particularly for full mergers and takeovers (models A and B).

When the merger is going to result in a new organisation (model A), approaches to funders for merger costs are best made by one of the merging organisations on behalf of both organisations. This means that although the application can make clear what the merger plans are, the funder can treat the application as coming from an existing organisation, rather than from a future organisation that is not yet operating. Accounts can be provided for both the merging organisations, including a consolidated statement if required. Likewise payments can be made to the applicant charity.

However, once the merger has taken place, the funder will only want to deal with the new organisation and will want to see their post-merger accounts as soon as possible. In Making Mergers Work, the Charity Commission provides advice on whether to account for a merger as an acquisition or as a merger. If the acquisition method is chosen, the ‘gain’ or ‘loss’ of the bundle of assets and liabilities is shown in the Statement of Financial Activities of the reporting charity which ‘acquired’ them, whereas under merger accounting, an ‘opening balance sheet’ is created from the initial assets and liabilities of the merging organisations, as though the merged entity always existed, and so no initial gain or loss is recognised.

Annexe 4 of the Charity Commission’s Making Mergers Work sets out three criteria from FRS6 for determining whether there has been a merger, rather than an acquisition:
- None of the charities is portrayed as the acquirer or acquired
- All of the charities participate in establishing the management of the merged charity and in selecting management personnel
- The relative sizes of the merging charities are not so disparate that one of them dominates the merged charity by virtue of its relative size

All funders and commissioners should be provided with details of the new organisation’s bank account prior to merger and asked to amend future payment arrangements accordingly. A range of other financial matters will also need to be addressed including insurance and supplier contracts.

SUMMARY

Pre-merger, approaches to funders are best made by one organisation on behalf of the others. Once merger has taken place, consolidated accounts should be produced as soon as possible, following Charity Commission advice.

INTEGRATING CULTURES

Cultural differences are often cited as one of the major reasons why mergers fail, usually because of a failure to recognise or anticipate differences and then a failure to address them.

Cultural differences are likely to arise at three levels:
- Differences in values – for example in terms of philosophies around empowerment, participation, user involvement and user control
- Differences in beliefs – for example in terms of attitudes towards unionisation, volunteer involvement and government policy
- Differences in behaviour – for example in terms of working practices, time-keeping, internal communication, attitudes to management and dress codes

Differences in values should be explored in Stage 1 and 2 as part of the due diligence process, as it is essential to establish that the merging organisations share, or are capable of sharing, the same values. However, differences in beliefs and behaviour may only emerge as the organisations begin to work together. There will often be perceived differences based on stereotypes or hearsay, which may turn out not to exist, as people begin to get to know each other. There is no substitute for open discussion at away days, social occasions and staff meetings for addressing the issue of cultural integration. At the same time, the CEO has a crucial role in providing leadership on this issue by constantly reinforcing the vision and modelling the values of the merged organisation at every opportunity.

SUMMARY

Over time, the new organisation will determine its own ways of doing things; specific mechanisms need to be put in place to help develop a sense of shared ownership.

Integrating cultures: Locality

DTA and bassac decided to appoint a senior member of bassac staff as Director of Integration. His role was to help ensure the creation of a new organisation, with its own distinctive identity. The creation of this part-time post, as well as the opportunities for trustees and staff to work together prior to merger, taking place and the involvement of independent/non-aligned members on the joint merger steering group, were seen as important factors in achieving a fully integrated approach and in ensuring Locality was much more than the sum of its parts.

The Director of Integration was a person approaching retirement with a good track record in the bassac movement, who was respected by both staff teams. He was able to help develop a new, Locality way of doing things, while still recognising the positive aspects of the way bassac and DTA operated. He worked with the board and acted as an independent watchdog for them on merger process, as well as alerting the SMT to staff’s feelings and views. He also helped develop a new relationship with members. The post continued for 15 months after formal merger took place.

Source: author interview with CEO, Locality
The rebranding process will usually involve appointing a branding agency and having meetings with trustees, staff, service users, supporters and other stakeholders during the process.

In a takeover, the letterhead of the main organisation may be amended to state that it now incorporates the smaller organisation, but according to TACT this can be dropped after a year or two, once integration has been completed.

Developing common email addresses and telephony can be done relatively quickly as part of office planning. However, the integration of all external communications is a far bigger task that can only be fully completed after the new brand has been agreed. It will involve developing integrated newsletters and bulletins and, most importantly, an integrated website.

Developing a new website will also usually involve appointing an agency, as well as having meetings with key stakeholders. Once it has been designed, a major task is the transfer of all the data from the existing websites onto the new one. Adequate time (and resources) must be allowed for this.

**SUMMARY**

Rebranding is an important opportunity to capture the essence of, and help promote, the new organisation, but interim arrangements are sometimes needed to explain which organisations have merged. Once rebranding is complete the website, newsletters and external communications can be integrated under the new brand.
**LAUNCHING**

The launch of the new organisation provides a major publicity and fundraising opportunity. How can this opportunity be maximised? Particularly relevant to full mergers (model A).

It is tempting to want to tell people about the new organisation as soon as possible after merger has taken place, but the launch of the new organisation is a once-and-for-all opportunity, which should not be wasted and needs to be well planned. Having the following in place before launching is therefore very important:

- New brand and website, together with range of communication materials
- Compelling statements about what the new organisation is going to do and what difference it is going to make
- Well-developed and funded plans for services
- Sponsorship support for the launch
- Plans and capacity for using interest created by the launch to generate funds

**SUMMARY**

Careful thought and planning needs to be given to the launch, so it is likely to take place some months after the actual merger has been completed.

**EVALUATION**

How should the success of a merger be evaluated? Relevant to all models.

As with any venture, there should be an evaluation of whether the merger has achieved the intended benefits, e.g. in terms of better services for users, stronger voice, increased efficiency and sustainability. In practice, this can be extremely difficult to measure, because the context in which the new organisation is operating is constantly changing. For example, even though the income of the new organisation may be smaller, it could be that the income of the merging organisations would have reduced even further without merger.

Nevertheless, one year on an evaluation should be undertaken. This should include a survey of beneficiaries, members, trustees, staff and funders to establish their perceptions of whether the merged organisation has achieved its intended benefits. A desk analysis of the accounts, numbers of members, numbers of customers etc should also be undertaken. The new organisation should have put in place a performance monitoring system, which would involve collecting this information on a regular basis.

**SUMMARY**

Although the merger process can be evaluated soon after it has taken place, it will not be possible to evaluate whether the outcome has been successful until at least a year after the merger has taken place. This should include getting the views of beneficiaries and relevant stakeholders.
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